United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7428

In The

United States Court of Appeals

For The Second Circuit

HOWARD C. HIRSCH, PAUL L. KOHNS and MARSHALL S. MUNDHEIM,

Plaintiffs-Appellants,

-against-

EDMOND duPONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., F.I. duPONT GLORE FORGAN & CO. and duPONT GLORE FORGAN INCORPORATED,

Defendants,

(Continued on Reverse)

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

JOINT APPENDIX

Volume IV, 961a - 1280a

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and

HASKINS & SELLS and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants-Appellees.

On Appeal from an Order of the United States District Court for the Southern District of New York.

PAGINATION AS IN ORIGINAL COPY

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Ex 263

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Affidavit of Hyde, pp. 962a - 965a

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HOWARD C. HIRSCH, et al., Plaintiffs, -against- EDMOND duPONT, et al., Defendants.	AFFIDAVIT 72 Civ. 775 (RLC)

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DAVID R. HYDE, being duly sworn, deposes and says:

1. I am a member of the firm of Cahill Gordon & Reindel, attorneys for defendant Haskins & Sells in this action. I am fully familiar with the proceedings to date in this action and the facts set forth herein.

2. I make this affidavit in support of the joint motion of Haskins & Sells and defendant New York Stock Exchange, Inc. (the "Exchange") to dismiss the federal securities laws claims of plaintiffs Paul L. Kohns ("Kohns") and Marshall S. Mundheim ("Mundheim").

3. On or about February 18, 1972, plaintiffs herein filed a complaint commencing this action. By order filed June 28, 1972, the Court granted the Exchange's motion for a more definite statement, and subsequently plaintiffs filed an amended complaint (also dated February 18, 1972) (hereinafter referred to as the "complaint", a copy of which is attached

hereto as Exhibit 1). The complaint (¶ 1) pleads that jurisdiction is based on Section 22 of the Securities Act of 1933 and Section 27 of the Securities Exchange Act of 1934. Violations of Section 17 of the Securities Act and Section 10(b) are alleged (Complaint, ¶ 2), as well as certain common law claims asserted under the doctrine of pendent jurisdiction. In substance, it is pleaded that on or about July 2, 1970, as a result of negotiations between Hirsch & Co. and Francis I. duPont & Co. (together with its successor partnership, F. I. duPont, Glore Forgan & Co., hereinafter referred to as "duPont"), Hirsch & Co. was liquidated and its assets and business were transferred to duPont. (Both Hirsch & Co. and duPont were partnerships doing business as broker-dealers in securities and were members of the New York Stock Exchange and other principal securities exchanges.) The complaint further alleges that pursuant to this transaction, plaintiffs Kohns and Mundheim, and a third partner of Hirsch & Co., Howard C. Hirsch ("Hirsch"), purchased general and limited partnerships in duPont, which partnerships plaintiffs allege were "securities" within the meaning of the federal securities laws. Attached as Exhibit 2 hereto is a copy of an Agreement dated July 2, 1970 (which has been marked for identification as Haskins & Sells Exhibit 6) and attached as Exhibit 3 hereto is an Agreement of F. I. duPont, Glore Forgan & Co. dated the same date amending the duPont partnership articles. These two agreements set forth the basic terms of the July 2, 1970 transaction referred to in this paragraph. As is evident from these agreements, Kohns and Mundheim became general and limited partners of duPont, and Hirsch became a limited partner of duPont.

4. Plaintiffs further allege that defendants herein - duPont, certain of its partners, its successor corporation (duPont, Glore Forgan Incorporated), Haskins & Sells (who performed certain services for duPont and Hirsch & Co. as certified public accountants) and the Exchange (of which both Hirsch & Co. and duPont were member firms) - made untrue statements of material fact and/or omitted to state material facts with respect to duPont's financial condition, business and operations, as a result of which plaintiffs were induced to enter into the transaction referred to in Paragraph 3 of this affidavit. Haskins & Sells and the Exchange vigorously deny committing any of the alleged wrongdoing or violations of law.

5. In May of 1974, active pre-trial discovery commenced in this action and shortly thereafter plaintiffs entered into a settlement with all defendants except Haskins & Sells and the Exchange, dismissing the complaint as to those defendants. Pre-trial discovery by both the plaintiffs and by Haskins & Sells and the Exchange has been substantially completed. (On May 1, 1974 Haskins & Sells served written interrogatories upon plaintiffs, which interrogatories plaintiffs have not to date answered. These interrogatories essentially relate to each and every purported misrepresentation or wrongdoing by Haskins & Sells alleged against Haskins & Sells in the complaint. They do not directly inquire into the subject of this motion, i.e., the nature of plaintiffs' partnership interests in duPont.)

6. During this pre-trial discovery, extensive depositions were taken by Haskins & Sells and the Exchange of Hirsch, Kohns and Mundheim, as well as other witnesses.

Attached hereto as Exhibits 4, 5 and 6, respectively, are the pages of the depositions of Hirsch, Mundheim and Kohns which are cited in the accompanying memorandum of law in support of this motion. In addition, the full depositions of those plaintiffs will be handed up to the Court.

7. Attached hereto as Exhibits 7 and 8, respectively, are two documents marked in this action as Exchange Exhibits S and II-S, which also are referred to in the memorandum. Exhibit 7 is a copy of a signed application of Mundheim to become a general partner of duPont, and Exhibit 8 is a copy of a signed application of Kohns to become a general partner of duPont.

David R. Hyde

Sworn to before me this
[illegible]day of February 1975

Notary Public

DAVID G. MORROW
Notary Public, State of New York
No. 31-4511749
Qualified in New York County
Commission Expires March 30, 1975

EXHIBIT 1 to Hyde Affidavit

See pp. 19a-27a above

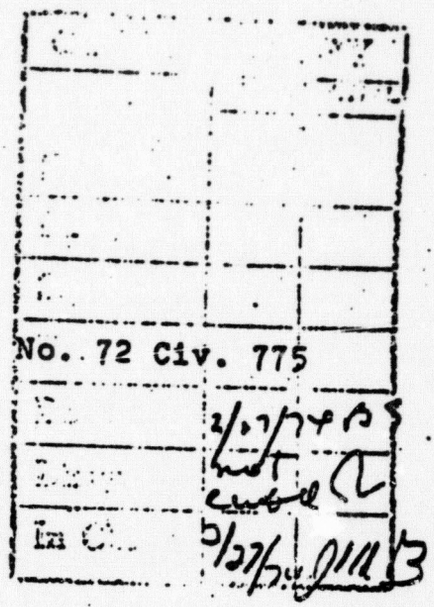
EXHIBIT 2 to Hyde Affidavit

See pp. 871a-903a above

EXHIBIT 3 to Hyde Affidavit
See pp. 100a-139a above.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK



HOWARD C. HIRSCH, PAUL L. KOHNS and MARSHALL S. MUNDHEIM,

Plaintiffs,

-vs-

No. 72 Civ. 775

EDMOND duPONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., F. I. duPONT, GLORE FORGAN & CO., duPONT GLORE FORGAN INCORPORATED, HASKINS AND SELLS and NEW YORK STOCK EXCHANGE, INC.,

Defendants.

Deposition of HOWARD CARLYLE HIRSCH taken by Defendants pursuant to notice as adjourned from time to time by stipulation, dated May 11, 1972, at the offices of Pollack & Singer, Esqs., 61 Broadway, New York, New York on Tuesday, February 19, 1974, at 10:10 a.m.

---oOo---

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TELEPHONE BARCLAY 7-6341

HOWARD CARLYLE HIRSCH, having been duly sworn by the Notary Public, was examined and testified as follows:

BY MR. POLLACK:

Q Mr. Hirsch, since there are quite a few attorneys in the room, I am going to tell you who I am and who I represent so that you may know from what directions the questions are coming from.

My name is Daniel Pollack, the firm is Pollack & Singer, and we represent in this action, Francis I. duPont & Co., F. I. duPont, Glore Forgan & Co. and Milton A. Speicher, individually.

In other words, we represent the partnership in liquidation and Mr. Speicher personally.

Mr. Hirsch, how long have you been in the securities business?

A Since 1920

Q Can you give us --

A May, 1920.

Q Can you give us in brief outline a resume of what you have done in the securities industry?

A I doubt it.

Q Will you try.

A That is 57 years. I was a member of quite a

number of exchanges.

I have been a member of certain committees and in the formation of a couple of exchanges, and I was a senior partner -- my father was a senior partner of Hirsch-Lillienthal and Company.

I got out of the Navy and I came down into the street.

Q Please proceed.

A It is rather hard to get -- to give you 57 years.

MR. CAMHY: I think the witness --

BY MR. POLLACK:

Q Is there anything you wanted to add to that description.

A I don't think so in particular. I was a senior partner of the firm since my father's death in 1938.

Q At what point did it become known as Hirsch & Co.?

A I think around 1944.

Q And were you --

A Maybe '42.

Q Were you a senior partner at all times during the period of time it was known as Hirsch & Co.?

A Yes.

Q Do you have familiarity with financial

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HOWARD C. HIRSCH, PAUL L. KOHNS and MARSHALL S. MUNDHEIM,

Plaintiffs,

-vs-

EDMOND duPONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., F. I. duPONT, GLORE FORGAN & CO., duPONT GLORE FORGAN INCORPORATED, HASKINS AND SELLS and NEW YORK STOCK EXCHANGE, INC.,

Defendants.

No. 72 Civ. 775

Continued deposition of HOWARD CARLYLE HIRSCH, taken by Milbank Tweed, pursuant to notice as adjourned from time to time by stipulation, dated May 11, 1972, at the offices of Shea, Gould, Climenko & Kramer, Esqs., 330 Madison Avenue, New York, New York, on Thursday, March 21, 1974, at 10:30 o'clock in the forenoon, before Kenneth Sofronski, a Shorthand Reporter and Notary Public within and for the State of New York.

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A - I am afraid that most of them would be with F. I. duPont & Co.

Q Or its successor?

A Yes, because they really pulled a very fast job in liquidating the firm and taking over -- this is only a matter of opinion, I think they took over our records from storage but the man who could answer that for you would be Mr. Mundheim.

Q In the year preceding July of 1970, had there been any discussions of merger or acquisition with any firm other than duPont?

A I believe so.

Q Can you tell me the name of that firm?

A I believe it was H. Hentz & Co.

Q Can you tell me what --

A And Bache & Co.

Q Any other?

A I think there were a number that had been up in the air which would probably be an acquisition on our part. Newburgher Company, a company in Philadelphia and there were quite a number.

Q Why was Hirsch & Co. considering or entertaining a merger invitation or discussions at this time?

A As far as my earlier period was concerned, I just

thought a firm had to be either very large, much larger than we were or smaller.

Q What about in this year preceding July of 1970?

A We feel it should be larger. And for several years before that, we had conversations with Becker.

Q Did you have any more specific objectives in mind other than merely being larger? What would being larger enable you to do better?

A In certain areas we wanted to be stronger. For instance in the discussions with Becker, most firms wanted our position in Europe which was of very long standing and successful.

Q How many branch offices did you have in Europe?

A When you ask me those questions, as a member representing the Exchange you shouldn't have any difficulty in getting those answers.

MR. CAMHY: Try to respond to the questions. Limit your response.

Q Can you tell me how many you had in the year preceding 1970?

A We had London, Paris, Geneva, Amsterdam and Vienna and an office in BA, Buenos Aires.

p. 975a

Q What were your objectives?

A Retirement and perhaps a satisfactory retirement arrangement.

Q Why was that not equally feasible with Hirsch & Co. maintaining its individual status?

A Well, that is hard to explain. It is largely a matter of timing and the turn of events.

Q When did the chance of a merger, for lack of better words, with duPont come to your attention?

A I think it was in early 1969.

Q Who first mentioned that possibility to you?

A That's hard for me to say. I don't recall. It was brought up and some of the partners discussed it among themselves before bringing it to me.

Q Did the partnership have meetings on any formal basis?

A Yes.

Q Were they at any set intervals?

A If you are talking about -- it varied over the length of the history of the firm.

Q Let's take '69 and '70.

A I think we had weekly meetings. Of course, there were many departmental meetings or meetings where

Ex. 5 to Hyde Affidavit, pp. 976a - 1026a

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HOWARD C. HIRSCH, PAUL E. [illegible] and MARSHALL S. MUNDHEIM,

-against-

EDMOND duPONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., F. I. duPONT, GLORE FORGAN & CO., duPONT GLORE FORGAN INCORPORATED, HASKINS AND SELLS and NEW YORK STOCK EXCHANGE, INC.,

Defendants.

Deposition of MARSHALL MUNDHEIM, taken by Defendant New York Stock Exchange, Inc., at the offices of Milbank, Tweed, Hadley & McCloy, Esqs., One Chase Manhattan Plaza, New York, New York, on Tuesday, May 7, 1974, at 10:10 o'clock in the forenoon, before Ruth Gross, a Notary Public within and for the State of New York.

* * *

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A Yes, it was a prep school.

Q Did you receive a degree from Lausanne?

A No, because foreigners don't receive degrees, they are in attendance.

Q Did you complete the requirements for a degree?

A Yes.

Q Mr. Mundheim, to speed things up and because your employment background is so varied, I have a copy of your interview before the New York Stock Exchange Board of Governors subcommittee of the Advisory Committee on Admissions, dated June 4, 1952, where you summarized your employment background prior to becoming a general partner of Hirsch & Company, and I would like you to identify that and then we will be up to where we should begin for this case.

Is that an accurate transcript, as you recollect, sir?

A Yes.

MR. BROOKS: May we mark this as Stock Exchange Exhibit I, which I believe is the next in order.

(Copy of transcript of Mr. Mundheim's interview before the New York Stock Exchange

foreign offices, the supervision of the commodity department.

MR. BROOKS: Off the record.

(Discussion off the record.)

A General administration, back-up for the managing partner.

Q Was that what you started to do after the training program, and continued doing? I would like you to trace it step by step, if there is a step-by-step progression.

A Yes. I think the early part of my association with Hirsch was really looking and listening and observing and acquiring an indoctrination in the mechanics of the operation of a brokerage firm. I think I leaned more towards the administrative end because that was more akin to business management and not as specialized as certain phases of the financial industry.

At no time did I get into the so-called sales contact or production quotes or the specialization of the underwriting department, bond department. All of those things were handled by people solidly experienced.

Actually, when Mr. Hirsch invited me or discussed with me the idea of my joining Hirsch & Company, I asked him very directly, why he invited me,

because I had nothing to offer, as I saw, into a member firm.

His response, as I recollect, was that he felt someone with a business viewpoint might have something, could have something to offer to the partners who were strictly professional men in the industry.

Q Would it be fair to say that from after completion of your tour of training that you involved yourself with the running of the firm as a business and its administration?

A Yes, with supervision of specific departments.

Q Which you had supervision of?

A Yes.

Q How long did the training program or period take?

A I suppose upwards of a year, of six months.

Q Were you ever assigned a title, such as managing partner?

A No.

Q Did Hirsch & Company have titles that partners were given to designate the area or nature of their responsibility?

A Hirsch & Company had a managing partner.

Q Who was that?

A Paul L. Kohns.

Q Was this true during the whole period you were with them?

A During the whole period.

Q Would you tell me the areas of responsibility that were under your jurisdiction?

A Directly under my jurisdiction, at different times, were the --

MR. CAMHY: I think I will now request that times be delineated in the question rather than in the answer. Why don't you cut off segments of various years?

Q Why don't you tell me the first areas of responsibility, and stop, and then I will ask you another question.

A I am just trying to remember. You know, after all, we are going back 20-odd years. Frankly, I don't remember.

I think that it was mostly working along with Mr. Kohns, and perhaps at that time we were getting into the, more into the computer phase.

Q When you did get into the computer phase, did that area come within your area of responsibility?

A To a minor degree. Everything was the responsi-

bility of Mr. Kohns and I worked with him. It was more than a one-man job.

I would not say that it was a direct responsibility of mine, no.

Q Can you tell me what are the first areas of direct responsibility that you recall having?

A If my memory serves me correctly, I believe it may have been the commodity area.

Q Is that all?

A Yes.

Q How long did you continue having jurisdiction in the commodity area?

A Well, right up to the end.

Q Were there any other areas that you eventually assumed responsibility in?

A Yes, the foreign branches.

Q When did you start becoming responsible for the foreign branches?

A I really don't remember.

Q Can you approximate it, five-year gaps?

A I would think -- I really don't remember.

The way I can identify it most easily is when the partner who was in charge of the foreign area resigned, and that is a matter of record, when he left,

Albert D. Young.

Q Would you have been in charge of the foreign area for the last five years of Hirsch & Company's existence?

A Yes.

Q Any other areas you recall being in charge of?

A Directly, no.

Q Any other areas that you indirectly had responsibility?

A Indirectly, that only if Mr. Kohns was not there, if he was out of the city for one reason or another. As you know, this is a business that you just can't make table decisions. They have to be made promptly, and if something had to be done promptly, I had to take that responsibility. It was a day-to-day or minute-to-minute thing.

Q By that do you mean that in Mr. Kohns' absence, you were the man in charge, to the extent that the firm had a man in charge?

A Yes, other than Mr. Hirsch, who was the senior partner.

Q Let me get the role of Mr. Hirsch and Mr. Kohns straight.

Who would be considered the chief executive officer, if that term were applicable?

A I would say the chief operational officer was Mr. Kohns.

Q What duties did Mr. Hirsch have as the senior partner?

A Direct duties?

Q Yes.

A I would think as counselor, as any senior partner in a firm, with the benefit of his experience.

Q What employees, if any, reported directly to you?

A The foreign staff and the commodities.

Q Any other?

A We had what we called an office manager, a back office manager, and he reported to Mr. Kohns and I sort of tagged along.

Q To whom did the controller report in the last three or four years?

A The controller, as far as in my mind, reported to both Mr. Kohns and, as I say, I tagged along. Mr. Kohns and I worked very much as a team.

Q Can you think of any other areas of responsibility that were yours, that we haven't discussed?

A Not that I -- I have no objections to telling you any areas if they came to mind.

Q But you don't recall any now?

A I don't specifically recall any others.

Q Did you pursue your duties as an active partner of Hirsch & Company on a full-time basis?

A Oh, yes. That was a requirement of our partnership agreement, and I believe it is also a requirement of the Stock Exchange, if I am not mistaken.

Q Did the initial $300,000 investment of yours in Hirsch ever come to be increased by you?

A It was increased over the years by retained earnings.

Q Did you ever put in more capital?

A No.

Q What was your capital share, in dollars, at its zenith?

A It's a very awkward question. I really don't know.

Q Can you approximate?

A This is a matter of record, and it may sound strange to you, but I was not working for money. I was working because I enjoyed it at the time. I have never, fortunately, had to think too much about it, so I never concerned myself with it.

you had with Francis I. duPont concerning a merger or other similar transaction with that firm.

MR. CAMHY: Which, as I understand it, is sometime in February.

MR. BROOKS: I don't know. No one has ever been able to place that definitively. Maybe Mr. Mundheim can.

MR. CAMHY: The last question was directed to how long he thought the firm could continue on the way that it had been.

MR. BROOKS: Yes, at the time they entered into the first discussions with duPont.

MR. CAMHY: That assumes that he made such a calculation in terms of months of life expectancy, which I don't think necessarily exists in the record.

May I ask, did you ever try to formulate that kind of a chronological forward look?

THE WITNESS: No.

MR. CAMHY: The answer is "no."

BY MR. BROOKS:

Q Mr. Mundheim, did any partners of Hirsch & Company propose a merger with another firm as an answer to the problem which you formed the opinion could

be remedied by reduction of expences?

MR. CAMHY: May I ask you to reframe the question, please. May I suggest, did any partner suggest a merger with another firm as a solution to the continuing problem of operating losses.

MR. BROOKS: I adopt your question, Mr. Camhy.

A Yes.

Q Which partner?

A I don't remember.

Q Was such a suggestion one of the reasons for Hirsch pursuing merger discussions with various firms in the spring of 1970?

A Excuse me.

(Discussion off the record.)

MR. CAMHY: Mr. Brooks, here again you hit a time problem because of the year 1970.

Mr. Mundheim advises me that they did talk to others, but he is not sure whether they talked to others in the same year that they talked to duPont. He knows that they talked to others during that period which could have gone back a month or two into 1969.

THE WITNESS: Or further.

MR. CAMHY: Or further back into '69.

Q In the period, whether it fell back into 1969 or not, would that have been one of the reasons for so doing?

Have you in mind the initial question?

MR. CAMHY: Mr. Mundheim, was your discussion of possible merger with other firms the result of the fact that you were dissatisfied with the results of operations?

THE WITNESS: No.

MR. CAMHY: You better ask your own questions.

BY MR. BROOKS:

Q What were the reasons for discussions with other firms on the possibility of merger?

A The outlook of the Street.

Q What do you mean by that?

A You have to either be a very large firm, or small, and we were a medium-sized firm.

Q You have to be either a very large-sized firm --

A Or a small firm.

Q What size was Hirsch?

A We always thought of ourselves as being a medium-sized firm.

Q What fate did you foresee for a medium-sized firm in the Street at this time?

A We did not see a fate.

Q What did you mean when you said you either had to be a very large firm or a very small firm?

A That was an evaluation of the direction in which we thought the industry was going.

Q What was the alternative if you were not a very large firm or a very small firm, in your mind, or minds?

MR. CAMHY: I don't think the witness understands the question, although I did, Mr. Brooks.

MR. BROOKS: The witness said, "It was our" --

MR. CAMHY: Was it your view that if you weren't large or very small, you would continue to have an unsatisfactory experience and operating result, the way the Street was going?

THE WITNESS: For the long range.

BY MR. BROOKS:

Q And a possible end would be to go out of business, would it not?

A That was not even discussed.

Q Mr. Mundheim, were there any other reasons

for Hirsch & Company seeking a merger candidate in this late '69 or early '70 period?

A Excuse me.

(Discussion off the record.)

MR. CAMHY: What was the question?

(The reporter read the pending question.)

A From a personal standpoint, I wanted to get out of business, and as I was one of the major capital partners, it would be awkward for the firm if I withdrew. Mr. Hirsch, who is ten years older than I am, expressed a desire to reduce and/or eliminate his activities. Mr. Kohns, who is six years older than I am, didn't feel quite the same way that I did or that I understand Mr. Hirsch felt, and the firm had been in business for upwards of 60-odd years and I personally felt that it would be almost improper or indecent or immoral if I just pulled out, believing that I had a certain social responsibility to the employees who had been very loyal for many, many years to the firm, as well as the younger partners who should be given every opportunity to go forward.

Q Were there any other reasons that you know of for partners of Hirsch & Company seeking a merger candidate at this time?

MR. SPINOGATTI: I don't know if he finished his part of the answer.

MR. BROOKS: I didn't mean to cut him off.

MR. SPINOGATTI: You might have. Let me find out.

(Discussion off the record.)

A Really, the conclusion of what I said is that in view of Mr. Hirsch's attitude and mine, it was wise to seek a satisfactory merger so that I could -- with the right firm, so that I could accomplish what I wanted to accomplish. That was to retire from business.

Q Were there any other reasons that you know of for the partners of Hirsch & Company to seek a merger candidate at this time?

A No.

Q Did Mr. Kohns oppose merger?

A No.

Q Did he favor it?

A He didn't oppose it.

Q Did he favor it?

MR. CAMHY: I think the question there is extremely broad, Mr. Brooks. As I understand it, there were one or more mergers, or two, discussed.

MR. BROOKS: I mean as a general proposition.

A No. Hirsch was an informal organization.

Q Do you recall which firm was the first prospect that you looked over?

A In recent years, because I am quite certain that over the years there have been all kinds of prospects?

Q I am confining the inquiry to 1970, or perhaps falling back into '69.

A As I recollect, I believe one of the first that serious consideration was given to was Newburger & Company in Philadelphia.

Q Do you recall when you considered that firm?

A No, I don't. I wouldn't -- no, I don't.

Q Tell me what you did in the course of considering that firm?

A We met with the senior partner, Frank Newburger, and we visited Philadelphia.

Q Anything else?

A And we discussed the pros and cons.

Q Did you make any investigation of the financial status of Newburger?

A None other than what they told us.

Q What did they tell you?

A I don't know.

Q You don't recall?

MR. CAMHY: Does the "you" mean you?

THE WITNESS: Did I personally? No.

MR. CAMHY: Was it possible somebody else did?

THE WITNESS: It was possible -- frankly, I don't know that we discussed too much on the financial phase. We were discussing mostly on the -- whether it would make a good mix and a good marriage, and whether personality-wise, as well as --

BY MR. BROOKS:

Q Is it true that you don't recall whether you got into the financial questions or not?

MR. CAMHY: Do you know, one way or the other?

A I think we must have, logically we must have discussed finances.

Q Did you form an opinion about the financial status of Newburger?

A It appeared that they had adequate finances for the business that they were running.

Q Do you recall whether you were advised of their capital ratio under Rule 325?

A Yes.

Q You do recall?

A I don't recall it. No, I don't recall it.

Q I don't mean, do you recall the number; but do you recall being so advised of the capital ratio?

A I don't recall it, but it would be a logical --

MR. CAMHY: Then you are assuming it?

THE WITNESS: Yes.

MR. CAMHY: There is no reason to put an assumption on the record.

MR. BROOKS: I think saying it would be a logical conclusion, it is more than an assumption.

MR. CAMHY: Were you responsible for receiving a financial report of Newburger?

THE WITNESS: No.

MR. CAMHY: Do you remember receiving any report about a financial investigation of Newburger, one way or the other?

THE WITNESS: No.

MR. CAMHY: You can put anything on the record you want.

BY MR. BROOKS:

Q Do you remember whether you became informed of their capital ratio?

A No.

Q Do you remember whether you became informed about any aspect of their capital or financial picture?

A Yes, that it was a profitable firm.

Q Did you get profit and loss figures from Newburger?

A I don't remember that.

Q Do you know what the basis was for your coming to the conclusion this was a profitable firm?

A A statement from Mr. Newburger.

Q Did you meet with Mr. Newburger personally?

A Yes, sir.

Q How many times?

A I don't recall.

Q More than once?

A Oh, yes.

MR. CAMHY: May we suspend for a minute?

(Whereupon, a short recess was taken.)

BY MR. BROOKS:

Q Over what period of time did the negotiations or discussions with Newburger take place?

A My recollection is that it must have been over several months time. The reason for that is that between his going south for the winter and one of us going somewhere else, and getting together.

Q Does that refresh your recollection as to the time of the negotiations?

A It does. It may have been in '69. It was not in '70.

Q When did you come to the conclusion that you wanted to retire?

A I came to the conclusion a long time ago, because in 1968, I retired from business at the age of 42. Mr. Hirsch got me into business in 1952, so retirement is not something that I did not enjoy.

Q When did you come to the conclusion you would like to retire from Hirsch & Company?

A In '68.

Q Can you fix it any more specifically?

A Prior to the time in which I was required to give notice under the partnership agreement.

Q Give notice of what?

A Of retirement or withdrawal.

Q Was that keyed to a certain age of the partner so giving notice?

A (No response.)

Q Was the time at which you were required to give notice keyed to the age?

A No. It required under the partnership agreement not to renew for the ensuing year.

MR. CAMHY: Off the record.

& Company to do any investigating?

A Not that I remember.

Q Did you obtain -- by "you" I mean the top partners who were handling the negotiations -- did they obtain any documents from Newburger to aid their investigation?

A I don't remember.

Pardon me.

(Discussion off the record.)

MR. CAMHY: The witness has indicated to me that he has some hazy recollection here. I don't know whether it is evidence or not. If you want to take it as speculation or conjecture --

MR. BROOKS: Playing the role of a judge, let's take it for what it is worth.

MR. CAMHY: Ordinarily, when a witness says to me in my ear, "I am not sure but I think," et cetera --

Why don't you say to Mr. Brooks what you said to me.

A Somewhere I have a hazy recollection that this was discussed with Mr. Petrillo of Haskins & Sells, and possibly some figures were put together by him, possibly, on a pro forma basis.

Q On Newburger?

A Yes.

Q Did Haskins & Sells do the auditing for Newburger?

A No -- not that I know of. I do not think so.

Q How did Mr. Petrillo get the data upon which he constructed the pro forma statement?

A If there was a pro forma statement. First you have to bear in mind we are dealing with Mr. Newburger, who is a gentleman, and if we are entering into a discussion of association and/or merger, we have to enter into it with open hands, so if there was this discussions, the only way we would have gotten it, or Mr. Petrillo would have gotten it, if he got it, would have been from Newburger, through us.

Q When you say "gotten it," are you referring to writings or oral communications?

A Figures had to be -- if Mr. Petrillo got anything from us, it had to be some numbers. Whether he got them in writing or verbally, I don't remember.

Q Do you recall whether Mr. Petrillo was present at any of the meetings with the Newburger people?

A No, I am certain he was not.

Q Can you tell me the next firm that Hirsch considered merger or liaison with, of that nature?

A There was some firm down in Philadelphia, I don't know who it was. I don't know the name.

Q Would the name Robinson refresh your recollection?

A Is that the only name?

Q Robinson & Company.

A It could be. Is that a Philadelphia firm?

Q It was.

Does that refresh your recollection?

A There was a firm down there. It somehow rings a bell, the name Robinson.

Q Do you recall what the extent of the investigation that Hirsch made of that other firm in Philadelphia was?

A Very short-lived.

Q About how short?

A I never met anybody from there. I never saw any figures from there.

Q Was there a reason for the investigation terminating after a short time?

A Yes.

Q What was the reason?

A The principals --

THE WITNESS: Is this libelous?

MR. CAMHY: Say it.

A The principals were from a different cut.

Q Did you come to learn any of the figures from the firm in respect to its financial or capital position?

A I didn't.

Q Do you know whether anybody did on behalf of Hirsch?

MR. CAMHY: Mr. Mundheim has been told recently that an investigation was made. He didn't know it or he wouldn't have recalled it if somebody hadn't told him yesterday, and if you want that kind of an answer, he will give it to you.

Q Tell me what you learned yesterday, Mr. Mundheim.

MR. CAMHY: Or within the last few days.

A I learned that Mr. Garibaldi had gone to Philadelphia and had brought back figures that were unsatisfactory.

Q Do you know how Mr. Garibaldi came to go to Philadelphia?

MR. CAMHY: He didn't even know.

A I didn't know he went there.

Q What you learned yesterday --

MR. CAMHY: He learned from me or Mr. Spinogatti.

MR. BROOKS: Did it include who told Garibaldi to go to Philadelphia?

MR. CAMHY: No.

Q Have you talked with Mr. Garibaldi in the last three months?

A No.

Q Did you learn what Garibaldi learned on his trip to Philadelphia?

MR. CAMHY: What he learned, he learned from me.

MR. BROOKS: I will take that.

MR. CAMHY: That, unfortunately, is privileged.

MR. MOSELEY: No, it is not.

MR. CAMHY: It is work product, if nothing else.

MR. MALONEY: I don't think so. When you talk to somebody and you get information, we may not be able to get memoranda, but we certainly

could get information. Information you learned is not work product.

MR. CAMHY: I don't think it is critical at this point.

What is the question?

MR. BROOKS: I don't know. Let me put another one.

BY MR. BROOKS:

Q Mr. Mundheim, do you have any knowledge as to what Mr. Garibaldi learned in the course of his investigation of the Philadelphia firm?

MR. CAMHY: Whatever knowledge he has, he learned from his lawyers in privileged conversation. I am going to object on the grounds of privilege. If you want me to tell you what he was told off the record, I will.

MR. BROOKS: I want to be on the record my answer to the question. I am not asking for the content of the communication, I am asking whether he has any knowledge about what Mr. Garibaldi learned on his trip to Philadelphia, and I submit it is not privileged.

MR. CAMHY: You tell him, because it is not really of any great consequence.

THE WITNESS: I don't remember what you told me.

BY MR. BROOKS:

Q Is the answer then no, that you do not have any knowledge?

A Of what Garibaldi reported.

Q Of what he learned.

A No.

Q What was the next firm that Hirsch investigated as a possible merger candidate?

A It may have been Shearson Hammill.

Q Do you recall the time when you investigated Shearson Hammill?

A No.

Q Can you tell me the extent of the investigation of Shearson Hammill?

A We had one meeting.

Q With whom?

A With a grcup from Shearson Hammill. I think at that time, as I recollect, it was Mr. Van Tuyl, Mr. Chapman, a couple of others.

Q Who represented Hirsch at this meeting?

A, I believe Mr. Kohns, myself, and Mr. Fraiman.

Q Was there more than one meeting with Shearson

Hammill?

A I only attended one meeting.

Q Do you know whether there was any other meeting that you did not attend?

A I believe that Mr. Kohns had only the one meeting that I attended. I can't answer what Mr. Fraiman did. I don't know.

Q Did you obtain any information about the financial or capital condition of Shearson Hammill in the course of your investigation?

A We didn't obtain anything from them.

Q Did you obtain anything from any other source?

A No.

Q So you obtained no information about the financial or capital position of Shearson Hammill; is that correct?

A That's correct.

Q Did you have any knowledge about the financial or capital condition of Shearson Hammill?

A No, to your question.

Q Were you going to say anything else?

A No.

Q Did Mr. Garibaldi perform any service with respect to the investigation of Shearson Hammill?

A Not to my knowledge.

Q How long was the question of possible merger with Shearson Hammill on the table?

A Days, perhaps.

Q Not more than a week then?

A Well, don't tie me down that tight. Certainly not a month.

Q Did you obtain any documents from Shearson Hammill?

A No.

Q Did you obtain any documents from anybody?

A No.

Q Did you discuss the possibility of an alliance with Shearson Hammill with Mr. Petrillo?

A I don't remember.

Q Did you discuss the possibility of an alliance with that Phildelphia firm with Mr. Petrillo?

MR. SPINOGATTI: Robinson, not Newburger.

MR. BROOKS: Have we agreed it is Robinson?

Q The unnamed Philadelphia firm.

A Not as far as I know.

Q Did you discuss the possibility of a merger with either Shearson or the unnamed Philadelphia firm with any outside source other than the representatives

of the potential candidate?

A I didn't.

Q Do you know whether anybody did on Hirsch's behalf?

A No, I don't know.

Q Did you discuss the possibility of merger with Newburger, the other Philadelphia firm, or Shearson, with any representative, employee, agent or governor of the New York Stock Exchange, omitting of course Mr. Fraiman.

A I did not.

Q Do you know whether anybody did?

A I don't know.

Q On Hirsch's behalf?

A I don't know.

Q What caused termination of Hirsch's consideration of Shearson Hammill as a merger candidate?

A It was caused by Shearson withdrew. After the one meeting which we had in which we more or less talked about the type of business that we had, and Shearson Hammill came to the decision that it was not to their interest at the time to expand into further retail business.

Q What was the next candidate that Hirsch

considered?

A I believe it was duPont.

Q Can you fix the time when that consideration first began?

A In 1970.

Q Can you fix it any more precisely than 1970?

A I can't fix it more precisely.

MR. SPINOGATTI: Mr. Brooks, may I have one moment with my client?

(Discussion off the record.)

MR. SPINOGATTI: Mr. Brooks, I think the client would like to add to one of his earlier answers. And I don't know how long you expect to go, but I would think, before you get into duPont, you might want to break for lunch.

MR. BROOKS: If it is not objectionable, I would like to break about 12:20 because I have a meeting that starts then.

MR. SPINOGATTI: Will we continue this afternoon?

MR. BROOKS: Oh, yes.

MR. SPINOGATTI: Why don't you add to your answer.

MR. BROOKS: Let's pursue the schedule a little bit.

Off the record.

(Discussion off the record.)

MR. CAMHY: We will start here tomorrow at ten.

MR. SPINOGATTI: Mr. Brooks, you asked him what the next merger candidate, or who the next merger candidate was, and I believe he answered "duPont." It was my understanding that there were a few other firms considered before duPont, and I reminded Mr. Mundheim of that. He wishes to answer whatever questions you have.

BY MR. BROOKS:

Q I think my question was, who came next after Shearson Hammill, and your answer was duPont. Is there some intervenor?

A Yes, several.

Q Tell me who they are and the order in which they appeared.

A As I remember it, the first intervenor was Hentz & Company.

Q H. Hentz & Company?

A Yes.

Q How long did their possibility lie on the table?

A It must have been on the table for a fair amount of time. By that I mean more than a month.

Q Tell me what the course of those negotiations were.

A Hentz at that time was having a management consultant or engineering study being made by, I believe it was Lybrand, whatever their new name is. Is it Lybrand Ross?

Q In those days it was.

A I believe that was the firm, if my memory serves, and Hentz made the suggestion, if we would be agreeable, to have Lybrand, who knew their shop, come in and take a look at ours and then see what they could bring out.

Q Did Lybrand come in and take a look?

A Yes, he did.

Q Were there further discussions with the Hentz principals by Hirsch principals?

A Yes, after Lybrand had made their report.

Q Did you attend those discussions?

A I did.

Q How many meetings were there?

A As I remember it, there was just one.

Q Can you tell me what, in substance, was said

by the two sides?

A Well, in substance, Lybrand gave us a very good send-off from an operationsl standpoint and a clean shop. Hentz apparently was having their headaches and the senior partner of Hentz at that time, I believe, was in Europe and these discussions were going on without him, and he did not want it when he came back or they were able to contact him; he didn't want any further discussion.

Q Did you learn any information about the financial or capital situation at Hentz & Company in the course of your investigation?

A Oh, yes.

Q Tell me what you learned?

A I don't really remember, but it was satisfactory. I think it was more the management that we were concerned with.

Q Did you obtain any information on the profit and loss picture?

A Yes, but I don't remember it.

Q Did you obtain any information about their capital position in respect to Rule 325?

A I don't remember.

Q You don't remember it or you don't remember

whether you obtained such information?

A I don't remember whether we obtained it.

Q What other information did you obtain about Hentz?

A The information in general was that we didn't go very far at all because Hentz didn't want to pursue it because they felt that they were -- or the impression we received was that they felt they were in a disadvantageous time to pursue the merger possibilities.

Q As far as you went, what other information did you obtain, other than profit and loss, about Hentz?

A Just general discussion, nothing specific.

Q Did you see any documents reflecting financial or operational or capital?

A Not as far as I remember.

Q Did Mr. Garibaldi perform any services in respect to Hentz?

A Not to my knowledge. Not to my memory.

Q Did anybody else who was an employee of Hirsch?

A I don't recall anything.

Q Did you speak with any outside source, such as Mr. Petrillo or the Stock Exchange?

A I don't recall, but it is not unlikely.

Q That what?

A That we talked with Mr. Petrillo.

Q Do you recall if you or anyone in the group of Hirsch negotiators spoke with anybody from the New York Stock Exchange about possible merger with Hentz?

A I did not.

Q Do you know if anybody else did?

A I do not.

Q Which firm followed Hentz?

A I understand it was Bache & Company.

Q What is the basis for your understanding of that?

A Simply that Mr. Kohns told it to me. I was overseas at the time.

Q On business for Hirsch & Company?

A Yes.

Q Do you have any other knowledge about the investigation of Bache, other than the fact that Mr. Kohns told you that there was such an investigation?

A Mr. Kohns told me there was a meeting, one or two meetings, that he had.

Q Did he tell you anything about those meetings?

A I think the end result is really what counted, is that Mr. Kohns told me that Bache & Company would

not consider taking over any of our leases, and Mr. Kohns at that point no longer cared to discuss it.

Q Did Mr. Kohns tell you whether he learned any information about the condition of Bache & Company?

A No.

Q Do you know whether Hirsch & Company did learn any information about the condition of Bache & Company?

A No.

Q Do you know whether any outside source was consulted about possible merger with Bache?

A I was overseas at this time and I think it was very short-lived.

Q I take it neither Mr. Kohns nor anyone else so advised that there was an outside source consulted?

A Pardon?

Q I take it nobody told you that an outside source was consulted about Bache?

A No.

Q Who was next?

A Now I think it was duPont.

MR. BROOKS: Do you agree, Mr. Spinogatti?

MR. SPINOGATTI: Yes.

Q Can you fix the time as to the first

negotiation with duPont?

A As best as I remember, it would be within the first four months of 1970.

Q Who initiated the contact?

A Excuse me.

(Discussion off the record.)

MR. CAMHY: The question was, how was it initiated if you know.

MR. BROOKS: No.

Q The question was, who initiated it.

A I did.

Q How?

A Mr. Rousselot was the senior man at duPont, and over the years, in my duties of responsibility in the commodity department area, I had met Mr. Rousselot, originally, I believe before he joined duPont, when he was with Orvis Company, at creditors meetings at which we were creditors along with Orvis and others, and so we became acquainted.

Q Did he first suggest the merger or did you first suggest a merger?

A I phoned Chuck Rousselot and invited him for lunch, and I said, "Do you think there is any kind of a fit between your firm and ours?"

with Glore Forgan yet come up?

A I believe he did mention that there was this negotiation going on, or completed -- I am not certain which -- with Glore Forgan, who were very strong in underwriting, had strong underwriting positions, historical positions, and that also would make the tri-party venture more sensible.

Q Did you agree with that concept?

A We knew nothing about Glore Forgan, other than that they did have a historical position in underwriting.

Q Did you agree with the concept that Mr. duPont articulated for a combination of Hirsch and duPont?

A In addition to what I have already said, he elaborated considerably on the fact that each one of the three organizations have experienced and qualified personnel, and that hopefully, in a grouping together, we would be able to take advantage of the most experienced and sophisticated personnel from each organization, into the final organization.

Q Did he speak of any cost-saving features of such a union?

A I can't say that that was brought up; I don't know.

Q Taking the whole concept that he outlined

subject.

Q Mr. Mundheim, let me show you a document marked as Haskins & Sells Exhibit 6 at the deposition of Mr. Hirsch, and ask you if you have seen that document before.

MR. CAMHY: Do you recognize your signature on the document?

THE WITNESS: Yes, I do.

MR. CAMHY: He recognizes his signature on the document.

Q Is that, to the best or your knowledge, from examination and otherwise, the document which reflects the transaction, or transactions, undertaken with duPont in and about July 2nd or 3rd, 1970?

A Yes.

Q Were there any transactions undertaken with duPont in and about that time that are not reflected in Exhibit 6 by Haskins & Sells?

MR. CAMHY: Well, I call your attention, Mr. Brooks, to the fact that there is a partnership agreement somewhere, an amended partnership agreement, which also formed a part of this transaction. I assume you are talking about the two of them together.

BY MR BROOKS:

Q Mr. Mundheim, why did you make the investment reflected in Exhibit 6 if your objective was to get out?

MR. CAMHY: I object to it as having been asked and answered.

MR. MALONEY: I am going to ask it again because I don't think it has been answered.

MR. BROOKS: You can instruct him not to answer, but we will seek a ruling and if we are successful, have him back to answer it.

MR. MALONEY: Off the record.

(Discussion off the record.)

MR. CAMHY: Do you want to ask the question again. Maybe Mr. Mundheim is capable of answering better than he already has.

MR. BROOKS: Why don't you read back the last outstanding question.

(The reporter read back the pending question.)

A. The investment was made for a limited time. I believe for a maximum -- a right to withdraw my investment within six months. I felt it was a prudent -- I felt it was a wise investment to make so as to relieve myself of all contingent liabilities.

Q Would the transaction reflected in Exhibit 6

C2Z

have gone forward if you refused to reinvest the money that you invested in the merged firm or in the new entity?

A I don't know.

Q Did you ever discuss it with anyone, discuss the possibility that you would put no money into the new entity?

A With whom?

Q Anybody.

A Yes.

Q With whom?

A Some of my partners.

Q Which ones?

A I would think with Mr. Hirsch, Mr. Kohns, Mr. Fraiman.

Q As a group or individually?

A I don't remember.

Q Can you recall what you said to Mr. Hirsch and what he said to you about the possibility that you wouldn't put any money in?

A I don't recollect.

Q Do you recollect as to Mr. Fraiman?

A No.

Q Do you recollect as to Mr. Kohns?

A No.

Q Did you ever discuss it with any of the duPont representatives?

A Yes.

Q Who?

A I believe Mr. Latour.

Q Anyone else?

A Perhaps others, whoever was in the discussion.

Q Was it one discussion at which the topic came up?

A I don't remember; duPont was very anxious that I go along.

Q Why, if you know.

A I didn't know at the time.

Q What did you say to Mr. Latour and what did he say to you on this subject when you had the discussion?

A As I remember, it was only that the maximum that I would go along for would be six months.

Q Did you suggest you wouldn't make any investment?

A I think I did.

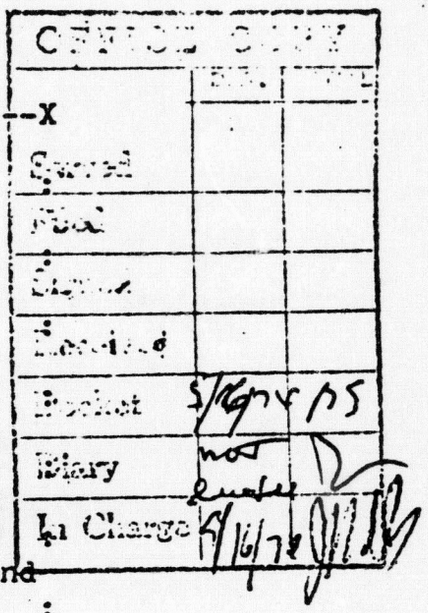
Q What did Mr. Latour reply to that suggestion?

A I think he was disappointed.

Q What did he say?

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK



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HOWARD C. HIRSCH, PAUL L. KOHNS and MARSHALL S. MUNDHEIM,

Plaintiffs,

-vs-

EDMOND duPONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., F. I. duPONT, GLORE FORGAN & CO., duPONT GLORE FORGAN INCORPORATED, HASKINS AND SELLS and NEW YORK STOCK EXCHANGE, INC.,

Defendants.

----------X

Continued deposition of MARSHALL S. MUNDHEIM, taken by Defendant New York Stock Exchange, pursuant to adjournment, at the offices of Milbank, Tweed, Hadley & McCloy, Esqs., One Chase Manhattan Plaza, New York, New York, on Thursday, May 9, 1974, at 10:15 in the forenoon, before Ruth Gross, a Notary public within and for the State of New York

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in mind for a number of years I had been fairly important at Hirsch & Company and at the new structure, I was considerably down the line in importance.

Q You told us yesterday that your intention and wish was to retire and that you had come to that determination sometime in late '68. Had you abandoned that determination as of July 2, 1970?

A I had an option under the agreement to look and see.

Q I know you did according to the agreement, but my question is whether you had reconsidered your prior decision to retire at the time you entered into the contract reflected by Exhibit 6 and were now, at least, willing to continue on for a while?

A I was willing to continue on for not less than six months.

Q And possibly beyond six months?

A That was the option that I had.

Q I know you had the option. My question goes to what your intention was.

A I don't recall whether I had an intention at that time.

Q Did the duPont representatives request similar rights of visitation or information from Hirsch

BY MR. BROOKS:

Q Can you tell me when you first saw Exhibit W?

A I don't know.

Q Mr. Mundheim, when you joined the duPont organization in July of 1970, what duties did you assume?

A The supervision of the Foreign Office.

Q Did you receive any title?

A As I recall, the title of partner.

Q Were you on any committees as a partner?

A When we joined duPont, not that I recall.

Q Did you ever become on any committee of partners?

A I believe at a later date I did.

Q What committee?

A I'm sorry. I don't remember what committees.

Q Do you recall how much later after you joined up that you got put on a committee?

A No, I don't.

Q You can't approximate the time at all?

A I just don't know.

Q Was it shortly, within a month?

A I would say within three months.

Q Was it the Finance Committee that you were put on?

you view a copy of Exhibit W?

MR. BROOKS: Off the record.

(Discussion held off the record.)

(A recess was taken.)

(The pending question was read back by the Reporter.)

A In the course of my duties?

Q At duPont.

A This had nothing to do with my duties.

Q I didn't say it did.

A Then I don't know what you mean in the course of my duties?

Q While being an active partner in duPont, being on the premises or traveling on the firm's business, did you view Exhibit W?

A I did.

Q Was that bulletin put out subsequent to the date that you became a partner in duPont?

A I don't know, other than reading Mr. duPont's opening statement, in which he says, "As you know, our mergers went through on schedule, July 2, 1970." It leads me to believe that this was issued later.

Q Did you consider yourself a partner of the duPont firm as of the day you signed Exhibit 6, the

contract?

A I did.

Q Would you look at the first page of Exhibit W, the last paragraph of that page. There is a statement in the last paragraph that the latest capital computation showed that the duPont firm was under the 1,200 percent safety level suggested by New York Stock Exchange.

Were you aware of such a safety level of the Exchange prior to the merger?

A The safety level of the Exchange were changing so rapidly that I can't tell you as of that particular date what I was aware of.

Q Were you aware that there was such a thing called a safety level?

A I was aware of that, yes.

Q Was Hirsch under the safety level, whatever it was?

A Yes, it was.

Q Do you know whether duPont was over the safety level prior to the merger?

A I don't know.

Q Was the topic of the safety level in respect to duPont discussed during your negotiations with duPont

please?

(The pending question was read back by the Reporter.)

A Not that I recall.

BY MR. BROOKS:

Q Let me show you a letter dated July 23, 1970, to Mr. Stock, signed by what is stated to be in the letter, the Finance Committee of F. I. duPont, Glore Forgan Co., and ask you if that bears your signature?

A It does.

MR. BROOKS: May we mark that as Exhibit AA.

(Letter dated July 23, 1970, to Mr. Stock from F. I. duPont, Glore Forgan & Co., Finance Committee, was marked as Defendant New York Stock Exchange Exhibit AA for identification, as of this date.)

Q Mr. Mundheim, does reading Exhibit AA refresh your recollection as to whether you were a member of the Finance Committee at duPont after the merger?

A It does.

Q Can you now tell me when you became a member of the Finance Committee?

A No, I cannot.

Q Would you agree that you were a member of the

Finance Committee on July 23, 1970, and thereafter?

A According to this Exhibit AA, I was on the Finance Committee, but I am not able to tell you for how long.

Q Do you have a recollection now, independent of Exhibit AA, of being on the Finance Committeee?

A This AA refreshes my memory. Yes to your question. yes.

Q Exhibit AA recites that Mr. Stock's letter of July 10, 1970, was read to the Finance Committee at its regular meeting on July 22. Do you have a recollection of that reading?

A I have to accept this letter as it's possible --

MR. CAMHY: He asked whether you can now remember it. Can you place it in your mind?

A I can't place it in my mind.

BY MR. BROOKS:

Q Are you able to state that such a reading did occur in your presence?

A No, I can't state that it did.

Q Would you have signed Exhibit AA, reciting that such a reading had occurred, if it had not occurred?

A I don't think so.

Q How often did the Finance Committee meet when you were a member of it?

A I don't recall.

Q Are the names that are on Exhibit AA the entire roster of the Finance Committee as you recall it?

A I have no recollection whether these names consist of the full committee.

Q Were there minutes kept of the Finance Committee's meetings while you were a member of it?

A I did not keep any minutes.

Q Do you know whether anyone did?

A I am not certain.

Q If minutes were kept, would you know who would have kept them?

A I believe Gough Thompson might be the one who would have kept the minutes.

Q Was there any particular representative of duPont who was assigned the task of investigating Hirsch prior to the merger?

MR. CAMHY: I think you asked that question this morning.

MR. BROOKS: I don't believe I did.

A Yes, you did.

MR. BROOKS: Then we will withdraw it, unless your answer has changed.

Q The letter which is Exhibit AA recites that

Ex. 6 to Hyde Affidavit, pp. 1027a - 1071a

UNITED STATES DISTRICT COURT

p. 1027a

SOUTHERN DISTRICT OF NEW YORK

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Diary	not expd	
In Chambers	6/7/74 JMA	

HOWARD C. HIRSCH, PAUL L. KOHNS and MARSHALL S. MUNDHEIM,

Plaintiffs,

-vs-

EDMOND duPONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., F. I. duPONT, GLORE FORGAN & CO., duPONT GLORE FORGAN INCORPORATED, HASKINS AND SELLS and NEW YORK STOCK EXCHANGE, INC.,

Defendants.

Deposition of PAUL L. KOHNS, taken by New York Stock Exchange, Inc., pursuant to notice as adjourned from time to time by stipulation, dated May 11, 1972, at the offices of Milbank, Tweed, Hadley & McCloy, Esqs., One Chase Manhattan Plaza, New York, New York, on Thursday, May 23, 1974, at 10:00 o'clock in the forenoon, before Ruth Gross, a Shorthand Reporter and Notary Public within and for the State of New York.

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with a Bachelor of Arts degree. Between school and college I worked in a very low clerical capacity at the Irving Trust.

After leaving college I joined R.H. Macy's & Company's executive training course and spent, stayed there until the summer of '23. I spent a month or two at a branch of the Irving doing some unimportant clerical, unstimulating clerical work. And then I spent the year 1924 in Macy's Paris office.

In, I think, January or February 1925, I joined a training course at L.F. Rothschild & Co., members of the New Stock Exchange.

January 1, 1930, I became a partner of Hirsch Lilienthal & Co., which in the 1940's became Hirsch & Company, and remained a partner there until the firm was dissolved in the 2nd of July 1970, when I became a partner of duPont Glore Forgan & Company, until December 31, when I ceased to be a partner and became a subordinated lender.

Q December 31 of what year?

A I'm sorry, 1970. I became a subordinated lender and an employee and ceased my association with that firm, to the best of my recollection it was in early 1972. Since then, I have not been employed.

ness. I became the partner in charge of their statistical department and in 1942, as closely as I can remember, the back-office partner or managing partner, if you would choose to call him that, resigned and inasmuch as many partners were in the war, I was selected to be the managing partner.

Q Does that mean that for all functions and operations of the firm, you were the responsible partner?

A In those years, I was responsible for the back-office operation despite the fact that I had no background whatscever in accounting, so little background that I went to, if you care for the fill-ins, --

Q Please. I think it might be helpful.

A -- to Gray & Gray, who were our outside accountants, and told the senior partner that he knew me and knew my qualifications and lack of qualifications and that frankly I didn't think I was competent for the job because of what I have just said. He assured me that I had business experience and I was intelligent, that I had department heads who would come to me with technical problems and all I would be required to give would be common sense decisions and that he felt I would have no difficulty in handling the job. My partners all knew

my lack of qualifications and I continued in that job so long as the firm existed but gradually became the senior partner taking a much broader responsibility.

Q What were the functions or duties of the senior partner?

MR. SPINOGATTI: Mr. Brooks, do you think we can rephrase that question? I am worried that the record will reflect that there is some kind of an official position called senior partner.

MR. BROOKS: I am just using the term the witness used.

MR. SPINOGATTI: All right, go ahead.

Q What did the senior partner do in the running of the firm, Mr. Kohns?

A He became the center for decisions and other partners would confer with him in matters of policy.

Q Would it be fair to say that you would be the equivalent of a chief executive officer of a corporation?

A Yes, I think so.

Q What time could you fix, if you were asked to fix a time, when you assumed that role?

A It's really not possible to answer you accurately.

Mr. Hirsch -- I can't answer you. It was gradual.

Q It was a gradual process of withdrawal by Mr. Hirsch and assumption of his duties by yourself?

A There was never any official appointment.

Q Can we say that it was clear by 1965 that you were the senior partner?

A There are several definitions, as Mr. Spinogatti, I imagine was trying to point out of what is a senior partner. One of the definitions is the man who has the greatest percentage in the profits and losses, and I don't remember when I reached that status, but prior to reaching that status, I was the operating head of the business.

Q What I am really interested in is a functional definition of the senior partner, the man who would be the chief executive officer of a corporation regardless of what share.

A By 1965, yes, I think I was.

Q At that time can you describe to me the functional responsibilities of Mr. Mundheim?

A He was the partner responsible for the foreign branch offices and our foreign business as a whole, and he worked with me on the back-office managerial problems. We worked very closely together.

A Except for the proviso I made that my personal account was considered part of my stake.

Q So there were securities in your personal account, were there not?

A Yes, but that wasn't the capital account.

MR. BROOKS: Off the record.

(Discussion off the record.)

(Recess.)

Q Mr. Kohns, if you could characterize how things were going at Hirsch & Co. in April of 1970, could you give me a characterization how the situation was?

A Yes, I will. I find it difficult to limit it to Hirsch. If you enlarge the scope, I will make a speech.

Q I don't want a speech. Answer the best you can. If the scope needs broadening, to give your answer, do so.

A Well, our feeling was that the way Wall Street was going and our anticipation of the future of Wall Street, that a firm of our size, which was what might be termed perhaps one of the larger of the middle firms, had no place. We required very expensive and very complicated electronic equipment and needed more volume to support it, so our thought was we either had to con-

tract vigorously or join another firm in order to get volume.

Q Had you made any projections about where you would go in the future if present factors remained the same or changed in any way?

A No.

Q Do you know whether any employees of Hirsch & Co. had been asked by any partner to come up with any such projections?

A Not to my knowledge.

Q You say that Hirsch was one of the larger of the middle size firms.

How many customer accounts did Hirsch have in April of 1970?

A As a pure guess, 20,000.

Q That is something more than a pure guess, isn't it?

A No. I mean, you can be a customer yesterday and not a customer today.

Q I am not asking you down to the last thousand.

A Yes, in terms of being within 5,000 accounts of accurate, it is no more than pure guess, yes.

Q How many registered representatives did

they have as best you can approximate?

A. Two hundred is the number that occurs to me, but I wouldn't want to be held to it.

Q. Had there been given any thought by the partners of Hirsch & Company to simply closing down and taking your capital and going out of business?

A. No.

Q. I understand that at least Messrs. Mundheim and Hirsch wished to retire, had reached a decision that they wanted to retire prior to April of 1970; is that your understanding?

A. They had both discussed it, yes.

Q. What was your position on retirement at about this time?

A. I wanted to die with my boots on.

Q. Were there any other partners who expressed the wish to retire as of April 1970?

A. Well, my hesitancy is due to Maurice Meyer Jr.'s position, where he had the right to retire should we make a merger which he didn't care to join.

Q. Was that agreement in the partnership agreement?

A. It was, I believe an amendment to the partnership agreement.

Q When did the amendment get put into the agreement?

A At the end of 1969, to the best of my recollection.

Q Had there been merger discussions prior to the insertion of that?

A Oh, yes.

Q Did Mr. Meyer advise you of what his concern was which led him to have that amendment added to the agreement?

A No.

Q Did you have any discussions with Mr. Meyer about merger at or prior to the time of the amendment?

A Oh, yes.

Q Did he take any general position in respect to merger?

A Well, there were a number of mergers under discussion.

Q Right, those would be specific considerations, but did Mr. Meyer take any general position that he didn't want to merge unless he merged with a small firm or a big firm?

A No, no.

Q Was there ever given consideration by the partners of Hirsch to the availability of additional

capital for the Hirsch firm in or about April of 1970?

A. Would you repeat that please?

(Question read.)

MR. BROOKS: Let me change that. It is not very elegant.

Q. Did the partners of Hirsch ever consider whether they could obtain additional capital for the firm, let's say in the first six months of 1970?

A. It was a problem that was brought up fairly constantly, the consideration of various individuals with whom we discussed. Specifically the time you mention, I have no recollection.

Q. Within about these months of loss, '69 and the first six months of '70, there was consideration given to obtaining of capital, was there not?

A. Actually, I think one or more partners joined us in the year 1970, if I am not mistaken, so the answer to your question must be yes.

Q. Other than the two partners that joined you, were you giving consideration to other sources of capital that you might call upon?

A. Not that I recall.

Q. What partners joined?

A. Mr. Marshall Spector joined about that time. It

is the only name that occurs to me.

Q Do you recall what his contribution to the firm was?

A He brought in a Stock Exchange seat that he owned and some capital which I think was in the 50 to $100,000 range.

Q Were there ever inquiries put to the other Hirsch partners as to whether they would be willing to put in additional capital either in 1969 or 1970?

A Not that I recall, no.

Q Was there discussion about that topic amongst the leaders of the firm?

A No, I think we knew the financial position of our partners well enough not to need a discussion.

Q From such knowledge, did you know that there was not a significant source of additional capital to be obtained from the present partners?

A Yes, I believe that is so.

Q I believe you said that there had been merger discussions prior to the amendment to the partnership agreement that Mr. Meyer requested, giving him the right to withdraw from a merger he didn't like.

Did you say that was at the end of '69?

A Yes, at that time he ceased to be a general

partner and became a limited partner.

Q Prior to the time of that amendment, can you tell me what other firms there had been merger discussions with?

A Newburger, in Philadelphia. Shearson Hammill, Hentz, Bache. If you call it a discussion, some Philadelphia house by the name, I think, of Humphreys. Those are all that occur to me.

Q Did any of these discussions get far enough along to cause you to make or have made on your behalf an investigation into the financial or operational condition of any of these firms that you were considering a merger transaction with?

A Yes, -- what is the Philadelphia firm?

MR. SPINOGATTI: Newburger.

A In Newburger's case and in Hentz' case there was some mutual disclosure of financial conditions.

Q Who conducted the investigation on behalf of Hirsch?

A It wasn't really an investigation. It was an informal discussion, perhaps the exchange of balance sheets.

Q Was there any employee delegated the task of doing any research or evaluation, documents or data,

with respect to these two firms?

A I think Mr. Weil went down to Philadelphia to familiarize himself with the operation, but whether it was in terms of operation rather than the finances, my memory isn't clear.

Q How about Mr. Garibaldi, was he given any task of evaluation, data gathering in respect to these two firms?

A Not until the duPont firm came under consideration, to the best of my recollection.

Q Who dealt with Mr. Garibaldi, if we can select any partner, to give him his instructions? Would it have been you, Mr. Mundheim or either of you?

A My recollection is that Mr. Mundheim called him in and while I was in, Mr. Mundheim's room.

Q That is as to the duPont investigation?

A Yes.

Q Generally, did Mr. Mundheim rather than yourself oversee Mr. Garibaldi's activities as they related to the general business of the Hirsch firm?

A Perhaps a little more than I did, yes.

Q But you did some at least?

A Yes.

Q Can you tell me just summarily, what be-

came of the negotiations with each of these firms you have named to explain why you never made a deal with them? Take them chronologically if you recall.

A We waited too long with Newburger, it dragged on too long. And they finally married to, I think, Advest.

The Humphreys was, if it isn't libelous, smelled from the beginning and was looked at only out of courtesy to the partner who brought the proposition up so we wouldn't arbitrarily refuse to consider it, but as I remember, the firm blew up very shortly thereafter. It wasn't seriously considered.

In the case of Hentz, they were having their operations looked into by a management consulting firm, one of the big ones; doesn't Price, Waterhouse do some management consulting as well as auditing?

Q I think many of the big accounting firms do.

A I think it was Price, Waterhouse, but it was the management consulting end of the firm, was looking into Hentz operations with the idea of trying to make it a more efficient operation, and we had had sufficient discussions with them to show that there was a real interest on both sides and they asked, if in view of Price, Waterhouse's familiarity with their work, whether

we would object to employing jointly with them, Price, Waterhouse to do a comparison of the two firms. Price, Waterhouse spent two days in our office and a meeting was called by, with partners of both brokerage firms present, and a comparison was made by Price, Waterhouse which showed Hentz in a relatively poor light from the point of view of operations compared to our operations.

Q How were they as far as capital then?

A They were not overcapitalized. Their senior partner was in Europe at the time all of the discussions were in progress and I believe -- all I know is what he told me. He called me on his return from Europe and indicated that he felt that they are in the middle of this reorganization, perhaps one might call it, and felt it was a poor time to talk merger. I gathered what he meant was that their bargaining position was not good after seeing the reports and it was dropped by them.

Shearson Hammill, there was one afternoon spent in their office with four or five of their partners and three or four of ours, and I believe they found that our operation didn't fit the kind of expansion they were looking for and it was dropped rather abruptly.

In the case of Bache, we had two meetings of seniors only and at the second meeting I asked their

senior partners what their thoughts were concerning our leases and he said that our leases were our problem, they had no interest in them and from then on, we had no interest in Bache.

If we were going to merge, we wanted to merge, using merger with restrictions we gave it originally, lock, stock and barrel, was the attitude we took there and took with duPont, so it dropped on that basis.

Q All these were before January 1, 1970, I take it.

A I can't date the Shearson so clearly.

Q That possibly could have been --

A Possibly in the year 1970, I don't know.

MR. BROOKS: Off the record.

(Discussion off the record.)

(Recess.)

Q Is the next candidate that was considered the duPont firm?

A Yes.

Q Who were the negotiators for Hirsch in respect to the firms that were talked with prior to the duPont discussions?

A Mundheim, Fraiman and I. I wouldn't want to say exclusively, because we are covering quite a fair period

of time and my memory is not perfect, as you may have found out.

Q You are doing quite well, I think.

Had you formulated any check list, whether written or in your mind, about what kinds of information you wanted to get from merger candidates, to enable the negotiations with them to proceed to any serious degree?

A No.

Q Such as their recent financial statement or recent audit report, you know, whatever?

A No, it depended on the stage of the negotiations. The first thing was always a question of whether you could stomach the personalities. If you couldn't, there was no use going any further.

Q With any of the firms that you dealt with in the past, did you ever get far enough along to require you to take a serious look at their financial statements or operational reports or things like that?

A Well, perhaps the Hentz was the nearest but that was, there we looked more at their operations report than we did at their financial reports.

Q Did Mr. Weil do the principal work in that review?

A. No, that was done by Price, Waterhouse.

Q. The consulting firm?

A. Yes.

Q. Who analyzed the report of the consulting firm?

A. They did.

Q. Who did?

A. Price, Waterhouse.

Q. Did you see it?

A. They gave a lecture before the partners of the combined firms on the items, Hirsch, Hentz, department by department.

Q. Did they render a written report?

A. No.

Q. Did you ever get anything in writing documenting their work?

A. No.

Q. Did you ever get anything in writing documenting their review of Hirsch?

A. No.

Q. Did you pay anything for this report?

A. Oh, yes.

Q. You never got anything in writing?

A. Not that I recall.

Q How much did you pay?

A As a rough guess, $2,000 as our half.

Q How did the duPont negotiations get started?

A I am confused on that question. I know that Mr. Mundheim knew Rousselot. Dan Pierce knew Gough Thompson. Fraiman knew Latour. Which came first, the chicken or the egg, I honestly don't remember. I don't know.

Q I take it there came a time where somebody in the Hirsch group said, "Why don't we give some consideration to duPont?"

A Yes. As I remember that particular episode, and it isn't necessarily the thing that touched it off, was a conversation between Latour and Fraiman which suggested a getting together. I was not at that get-together. I don't remember just when it occurred or what took place.

Q I take it Mr. Fraiman brought back a report that we ought to look a little further in the duPont direction?

A Yes, it was decided to pursue it further.

Q Did all the Hirsch partners vote on that or did just the three negotiators decide to pursue it further?

A At some stage, and I cannot recall whether it was at the inception or later, at a partners' meeting at Hirsch, a committee was formed to carry on the negotiations. That committee was Fraiman, Mundheim and myself. My recollection is not clear as to whether Mr. Hirsch was a member of that committee.

Q Is your recollection clear that he was at that meeting?

A Oh, yes.

Q I take it Mr. Hirsch's participation would be important in respect to both his historical position with the firm and the amount of his interest, would it not?

A At that time his interest had been cut at least in half by his own choice, but the respect for his years in, his former seniority, yes, his attitude was very important and the partners respected and looked up to him for guidance.

Q His capital stake in the firm was not small at this time, was it?

A No, it was substantial.

Q One of the largest?

A One of the four largest, yes.

Q Were there any minutes or memoranda kept

of this meeting that appointed the negotiating committee?

A Of the appointment?

Q The proceedings at the meeting.

A No. I have some recollection that there was a very short document appointing the committee that bore a substantial number of partners' signatures.

Q Was that circulated at the meeting?

A It was signed at the meeting, as I remember it, but our meetings were inclined to be very informal.

Q Do you know where we could get a copy of that appointment document? Do you have one?

A I searched in vain for it recently. I have some hopes of being able to get it from Guggenheimer & Untermyer's office and haven't heard from them as to whether their files contain it or not.

Q Have you made an inquiry to obtain that?

A Yes.

MR. BROOKS: Mr. Spinogatti, will you let us have a copy of that if you get it and look anywhere else that anyone thinks it might be found?

MR. SPINOGATTI: I will further Mr. Kohns' call to Guggenheimer & Untermyer and request that they search their files to see if they have it

and I will also ask Mr. Norman to look once again through the Hirsch & Co. liquidating committee files to see if he can find it.

I do not know if it still exists or if we have it, but if we do, we will produce it.

MR. BROOKS: Good.

Off the record.

(Discussion off the record.)

Q I take it there is no doubt that Mr. Hirsch either signed the appointment document or was one of the appointees, himself.

A There is no doubt in my mind.

Q Was this meeting and the appointment of the committee immediately or was it the next event in the consideration of the duPont firm following Mr. Fraiman's return with the report on his conversation with Mr. Latour and the report that there is reason to pursue further duPont?

A I believe I have already testified that I can't place it in terms of, in those terms.

Q When was the first time you met with anybody from duPont?

A I don't remember. There was a cutoff of the negotiations and a resumption of them and my recollection

of the period before the cutoff is practically nil. I just have no recollection.

Q Let me try to help you fix the time a little bit. We have come upon a newspaper article which I will represent to you comes from the Wall Street Journal of April 24, 1970, Page 22.

A Is that the one which I shot my face off?

Q I think so. Why don't you see if it is?

A I am not proud of that document.

Q Well, there have often been articles in this paper that I was not proud of either.

A I have learned that the only answer to a newspaperman should be "No comment."

Q Do you recall reading the article in about the time it appeared?

A Yes.

MR. BROOKS: Why don't we mark that as the next exhibit in order?

(Article from the Wall Street Journal of April 24, 1970, Page 22 was marked Defendant New York Stock Exchange Exhibit AAA for identification, as of this date.)

Q Assuming that the date penciled in on this article is correct, Mr. Kohns, does this help to refresh

your recollection as to when the first meeting that you had with duPont people would have occurred?

A. No.

Q. How far prior to calling off of the first series of negotiations did the negotiations commence?

A. As I have already told you, my recollections of the negotiations up to that time are practically non-existent. In other words, I don't know.

Q. Do you know whether you met with the duPont people at all during the first series?

A. I do not. I do not know.

Q. You don't know how long the negotiations continued before they were called off, do you?

A. A matter of some weeks which might mean roughly five, possibly less. Long enough for rumors to begin getting around, which is why they were called off.

Q. Had the Hirsch partners had a chance in the first series of discussions to make an analysis of the financial or capital or organizational condition of the duPont firm?

A. I am afraid I can only repeat what I have told you, that my memory of that series of discussions is virtually nonexistent. I don't know.

Q. Do you recollect the time when Mr.

in the portion of the article that purports to quote you. I am just referring to the material inside quotation marks attributed to you.

A Would you repeat the question?

(Question read.)

A I believe so, yes.

Q There are also statements attributed to you which are not in quotation marks.

Are those statements in substance fair attributions to yourself?

A Except for the fact that they compressed a longer conversation, therefore gave what I felt was an unfair picture.

Q Tell me what we would need to know to make the picture fair.

A In substance, I suppose the answer I gave you as to why we were thinking of merging.

Q That you needed to be a big firm or a little firm to survive?

A Yes, the whole picture of Wall Street's future and as you see the profit pinch comes as part of that. If you had greater volume --

Q The profit pinch, according to the article, also applies to the duPont firm and the article gives

A. I don't think I can satisfy you. I would think Mr. Weil undoubtedly brought it to my attention because he was probably getting the brunt of it.

Q. How about Mr. Weil, had he made any investigation of duPont either in this period or the subsequent negotiations?

A. Some, yes.

Q. Tell me what he did.

A. I don't remember.

Q. Did he undertake an investigation or analysis pursuant to a similar directive from Mr. Mundheim, similar to the one that went to Mr. Garibaldi?

A. I don't recall it.

Q. Tell me what you recall about getting the merger discussions back on track again after they were called off. How did that come about?

A. As best I recall it, I received a phone call one Sunday at home in Westchester, from Fraiman, to the effect that he had been playing golf, as I remember it, with Latour, who was pressing him to renew the negotiations and could they come over and talk to me, which they did.

As a result of that conversation, it was decided to have the first meeting I recall between a group of

partners of each firm. That meeting was held at Mr. Mundheim's home in an attempt to avoid publicity which would have resulted had we met, say, at the Stock Exchange luncheon club.

Q I am not clear.

Was there a meeting between yourself and at least Mr. Latour where it was agreed that you would meet again at Mr. Mundheim's home?

A Yes.

Q Who was present besides yourself and Mr. Latour?

A Mr. Fraiman.

Q Anyone else?

A No.

Q Was the entire substance of that meeting an agreement to meet again or was there more to it than that?

A There was some attempt of persuasion on the part of Mr. Latour of the mutual benefits to be derived.

Q What did he say?

A I'd have to be imagining it, I don't remember.

Q Tell me who was at the meeting at Mr. Mundheim's home that was planned at this meeting with Mr. Latour?

A Mr. Edmond duPont, Mr. Latour, I would think there must have been Mr. Speicher. In fact, I remember Mr. Speicher. Gough Thompson, maybe Llewellyn Young. I wouldn't be sure that there were no other duPont partners there, but I think I have covered those that were there and of Hirsch partners, there were Mr. Hirsch, Fraiman, Mundheim and myself. I don't think there were any other Hirsch partners.

Q Take the first gentleman you named, Edmond duPont, do you recall whether he said anything at the meeting?

A Yes.

Q Tell me what you recall that he said.

A He answered two questions that I asked him.

Q Which was the first question?

A I said, "I understand, Mr. duPont, that your firm has available a call on 20 million dollars should you need additional capital. Is that true?" And he said, "Yes, we have used two and a half million of it and we have seventeen and a half million still available to us."

Q Did you know where, the source was of the call on this capital?

A Yes, I think he told me. As I recall, it was some kind of trust, I think a family trust.

Q What was the second question that you put to Mr. duPont?

A "Should the unlikely problem arise that the seventeen and a half million not suffice, what plans have you for additional funds," to which his answer was, "I can only tell you, Mr. Kohns, that I have never come back from Wilmington empty-handed."

Q Is that all you recall Edmond duPont saying at the meeting --

A Yes.

Q -- other than pleasantries or insubstantial comments?

A That's all.

Q How about Mr. Latour. Did he make any statements of substance that you recall?

A If I may not answer your question but describe it in different terms.

Q Please do so.

A My understanding of the meeting was largely to get an impression of the personalities of the top command and whether they felt compatible so that it was really not very much of a business discussion so much as a --

Q Would it be fair to say that other than the questions you put to Mr. duPont about capital, that

there was no matter of substance covered at this meeting, to your recollection?

A. There was no serious business discussion. There may have been such questions as their saying, "Hirsch, you have a stronger position in Europe than we have which interests us and you have a stronger position in New York and we have a position nationwide far superior to yours."

I think the A.I. of the two firms was dropped as a casual introductory remark.

Q. By A.I. you mean aggregate indebtedness?

A. Yes. Each of us saying what ours was.

Q. Do you recall what the A.I. of duPont was said to be at the meeting?

A. No, but it must have been satisfactory or I would have recalled it.

Q. Did you have any reason for putting the two questions that you put to Mr. duPont to him at that meeting?

A. Simply the fact that all Wall Street was losing money and I saw no end in sight.

Q. So there may be need for some capital buffer?

A. It seemed to me a routine approach to a problem.

There was no hiding the problem.

Q Was Mr. First at this meeting?

A No, no lawyers except Llewellyn Young who was a partner of duPont as a lawyer.

Q Had Mr. First or Mr. Fuld gotten involved in the duPont negotiations or consideration of merger with duPont up to this time?

A Again I must fall back on my original statement as to the earlier negotiations. I quite honestly don't remember.

Q At the end of this meeting, had there been any decision reached on pursuing the matter further? How did the meeting close? What was the decision about any future negotiations?

A I think that Latour would get in touch with Fraiman.

Q What happened next, to your knowledge?

A The order of what happened is again something that four years afterwards is hard to bring back clearly. One of the earliest things that happened was that Mr. Mundheim and I went up to Mr. Fuld's office and I told Mr. Fuld that we were contemplating further discussions with duPont leading towards a merger and asked him whether he would join Ed First in helping us in negotia-

tions.

Mr. Fuld had just been involved in a relatively small Wall Street merger and therefore had some recent familiarity with some of the problems and he was well-known to several of my partners and, in fact, represented them and their families.

Mr. Fuld, before saying anything more said, "Paul, whom are my clients," by which he meant, the two partners I spoke of, whether he was representing them, and I said, "Jim, quite clearly, you are representing Hirsch & Company" and Mundheim reiterated the remark.

Q I take it Mr. First was also representing Hirsch & Company?

A Oh, yes. Mr. First had been Hirsch's counsel for years. Yes, I asked Mr. Fuld to work with Mr. First.

Q What happened next?

A We exchanged some figures, balance sheets, earnings figures and I received a batch of documents from duPont with a request that I return them in due course, which I did. In the meantime I showed them to a number of my partners, quite a number of them and I suppose I must have shown them to Garibaldi and Norman.

We sent partners and some of our key employees over to duPont to see whether they saw a place for them-

Q Did any partner or employee of Hirsch who was shown these documents request additional documents or information to make a complete evaluation of duPont?

A Not that I recall.

Q What happened next, as best you recollect, in the series of negotiations after your having received the documents?

A I remember meeting in Sheldon Stewart's office of Carter, Ledyard, in which, as I recall it, there was very substantial legal representation on both sides.

Q What about another meeting at Mr. Mundheim's home, do you recall that?

A Yes, I recall that.

Q Would that have occurred before the meeting at which all these lawyers were gathered?

A No -- maybe I was hasty -- I think it was after the meeting at Carter, Ledyard's.

Q Afterwards?

A I think so.

Q What of substance was said at the meeting at which the lawyers were gathered, other than the legal questions and discussion? Anything of substance discussed?

A I am unable to remember what was discussed at

what meeting, but they all gradually led towards a final agreement. At what stage each stopped, I don't recall.

Q Is there anything that sticks out in your mind about the meeting where the lawyers were present?

A No. The only thing that sticks in my mind as to any meeting was the meeting which I think was June 30, which was also at Carter, Ledyard's office and was not the meeting to which I previously referred.

Q What sticks in your mind?

A One of the things was the pressure of time. Because of bookkeeping problems, if a merger was going to take place July 2, I think the 1st was a Sunday, I think so, or it was a Saturday -- anyway, if technically the merger was to take place in the beginning of July, the papers had to be drawn up and unless final decisions were reached at the meeting I speak of, it was going to be impossible, in which case the merger would be delayed a month. That delay would have caused the kind of explosion I have referred to before of rumors and therefore it was agreed it was very important that an agreement be reached.

The one difficulty at this final meeting was a question of a group action by a group of underwriters of Revenue Property.

good fit between the two firms in respect to what one firm's strength and the other firm's strengths were?

A No, but, that I thought, entered into my question of what he thought about it. He knew intimately Hirsch's operations and personalities and I presume he knew it of a much more important firm, duPont.

Q Did the same analysis of losses and a good fit with the prospect of reversing the losses apply when Glore Forgan was added to the deal as the third member?

A I don't understand the question.

Q We have discussed what strengths duPont had. I think you have mentioned the fact that they had a good nationwide system of branch offices. We discussed the strengths of the Hirsch firm, international operations and good New York base.

We haven't discussed the strengths of Glore Forgan.

A Yes, there were two things that were discussed as to what Glore Forgan brought in to add strength to the picture. Most important, they had an excellent underwriting -- there is an underwriting expression for it, seniority. Once you get in General Electric's underwritings, you are there for life, and they had a wonder-

ful history of underwritings which made them valuable from that point of view and the thought was expressed that with three firms of the size and caliber of the three involved, that we ought to have the best back office personnel in Wall Street by choosing the best from the three firms.

Q So that as a business matter, this deal seemed to make good sense?

A Yes.

MR. BROOKS: Off the record.

(Discussion off the record.)

MR. BROOKS: We have all agreed to continue Mr. Kohns deposition to June 11, 1974, starting at 10:00 a.m. here and to keep open June 12, should it be necessary to run over to that day and that we will continue even if the application for an extension of discovery is not granted, to the best of our ability to do so.

(Time noted: 3:00 p.m.)

Subscribed and sworn to before me this _____ day of _____ 1974.

_____

_____
PAUL L. KOHNS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

HOWARD C. HIRSCH, PAUL L. KOHNS and MARSHALL S. MUNDHEIM,

Plaintiffs,

-against-

EDMOND duPONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., F.I. duPONT, GLORE FORGAN & CO., duPONT GLORE FORGAN INCORPORATED, HASKINS AND SELLS and NEW YORK STOCK EXCHANGE, INC.,

Defendants.

----------x

Continued deposition of PAUL L. KOHNS, taken by Defendants New York Stock Exchange and Haskins & Sells, pursuant to adjournment, at the offices of Milbank, Tweed, Hadley & McCloy, Esqs., One Chase Manhattan Plaza, New York, New York, on Wednesday, June 19, 1974, at 10:15 a.m., before Charles Shapiro, a Notary Public within and for the State of New York.

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one series of meetings or another, and I can only think of what was said.

Q Okay, tell me what was said by Mr. Latour.

A Quite specifically, at that meeting at my home in which Mr. Fraiman brought Mr. Latour over from the golf course to reopen discussions, Mr. Latour pointed out that Glore Forgan would bring in an excellent historical background in underwriting which would strengthen that division; that Hirsch & Company would bring in a fine old reputation in the European field and considerable strength in the Metropolitan Area, both of which were lacking to the other two organizations.

I think there were some flattering things said about brains being added to the organization.

Q Yes. Was there anything else?

A I have no doubt capital was mentioned.

Q Do you recall what in substance was said about it?

A I think there was a suggestion as to the approximate amount of capital they would expect Hirsch to bring in. I have no recollection of the capital of Glore Forgan's contribution. There was mention of AI, if that expression is clear to you.

particular benefits for the top three partners with other partners at Hirsch?

A Not that I know of.

Q Do you know whether these particular benefits for the top three Hirsch partners were an issue with the duPont negotiators or did they readily agree to them?

A Not having been present in the negotiations, I cannot answer you.

Q Did you receive any reports that they were having trouble accepting these kinds of benefits?

A No.

Q After the merger, what titles or positions did you hold at the merged firm?

A Me personally?

Q Yes, sir.

A I was a member of the Finance Committee and of the Directing Partners.

Q What was the function of the Committee of Directing Partners?

A It was somewhat honorary. It tended to rotate and allowed a group to get reports on matters of general interest from time to time.

Q I take it when you say "honorary," it was

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOWARD C. HIRSCH, PAUL L. KOHNS and MARSHALL S. MUNDHEIM,

Plaintiffs,

-against-

EDMOND duPONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., F. I. duPONT, GLORE FORGAN & CO., duPONT GLORE FORGAN INCORPORATED, HASKINS AND SELLS and NEW YORK STOCK EXCHANGE, INC.,

Defendants.

Continued deposition of PAUL L. KOHNS, taken by defendants pursuant to adjournment, at the offices of Milbank, Tweed, Hadley & McCloy, Esqs., One Chase Manhattan Plaza, New York, New York, on Thursday, June 27, 1974, at 10:15 o'clock in the forenoon, before Charles Shapiro, a Notary Public within and for the State of New York.

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those minutes which are under a covering memorandum as being a true recitation of the proceedings at the meeting.

A This memorandum changes my recollection of the definition of executive board, or whatever it was called in the previous memorandum.

Q Right.

A This is the board of directing partners, which was a much bigger group.

Q Was that what you meant when you used the term "executive committee" in your immediately prior testimony?

A I am sorry?

Q Is that the body that —

A The limited group is not this group (indicating).

Q Are those minutes accurate, as far as your recollection goes?

A Yes.

MR. BROOKS: Will you please mark them for identification, Mr. Shapiro.

(Minutes of the meeting of the board of directing partners of the merged duPont firm, July 15, 1970, marked Defendant New York Stock Exchange Exhibit UUU for identification, as of this date.)

Q This indicates you were appointed to a task force to work on reducing costs. Do you recall that?

A Yes.

Q That task?

A Yes.

Q Do you recall whether the task force was successful in meeting the goals that had been set for it?

A No, but conditions changed so rapidly that --

Q In which direction did conditions change, for the better or worse?

A Well, the earnings picture deteriorated, there was a reduction in costs.

Q I see, but --

A Whether one evened out the other, I don't remember.

Q Do you recall generally what the profit and loss picture was in those first months after the merger had been completed?

A No, I don't.

Q Did it continue to deteriorate throughout the summer and fall of 1970?

A My memory is not clear on the matter.

Q Do you recall the audit of F. I. DuPont that was done by Haskins & Sells as of September 30, 1970,

about it, other than it just being bad news?

A No.

Q Do you recall whether there was a capital deficiency shown by the figures generated by the auditors?

A I do not.

Q During the summer and fall of 1970, other than that time that you were on vacation, were you active and in the office fulfilling whatever duties had been assigned to you as a duPont partner?

A Yes.

Q Would you say that by early December you were familiar with the condition of the duPont firm?

A I would say more familiar, but I would qualify the word "familiar." No, I was not familiar. I was more familiar than I had been. It took a great deal of knowledge. In fact, I think it took Haskins & Sells many months to arrive at that.

Q Having the benefit of Haskins & Sells' report, would you say that you were as familiar with the status of the duPont firm as the majority of the other duPont partners?

A I can't answer you.

Q The contract as of July 2, 1970 provided that the Hirsch partners could withdraw their capital

each to three years.

My share of those losses applied to only six months, the second six months of '70, and therefore, applying them to me was a complete misstatement of my rights.

Q Let me go back to my original question. I was referring specifically to a period prior to July 2, 1970, before you entered into the merger, and I was asking you whether or not you knew of any misstatements of fact by Haskins & Sells other than you have referred to, and you are referring now to what transpired later in 1971; is that correct?

A Yes.

Q Mr. Kohns, in connection with your decision in December of 1970 as to whether or not you would withdraw your capital from duPont, did you have any conversation or discussion with anyone at Haskins & Sells?

A I believe not.

Q You testified, I believe, that you were a member of the finance committee of duPont after you became a partner; is that correct?

A Yes.

Q Did you become a member of the finance committee immediately upon the consummation of the merger?

A Yes.

Q And did you continue as a member of the finance committee through the end of 1970?

A Yes.

Q How often did that committee meet?

A Normally once a week.

Q How many members did it have?

A Approximately eight.

Q Who were the members other than yourself, if you can recall?

A Mr. Edmond duPont, Mr. Latour, a Chicagoan who owns the White Sox -- what is his name?

MR. BROOKS: Allyn.

THE WITNESS: Yes.

A (continuing) -- Mr. Speicher, Gough Thompson. That's all I can remember at the moment.

Q Did Mr. Mundheim ever serve on the finance committee?

A No, he served on the executive committee.

Q What was the function of the finance committee?

A It was the top authority and it was the executive group that ran the firm. It was the senior -- it was the policy-making group.

Q Mr. Kohns, in connection with the Haskins &

EXHIBIT 7 to Hyde Affidavit

See pp. 613a-617a above

EXHIBIT 8 to Hyde Affidavit

See pp. 623a-627a above

Notice of Motion, pp. 1074a - 1075a

p. 1074a

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HOWARD C. HIRSCH, PAUL L. KOHNS and MARSHALL S. MUNDHEIM, Plaintiffs, -against- EDMOND duPONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., F. I. duPONT, GLORE FORGAN & CO., duPONT GLORE FORGAN INCORPORATED, HASKINS AND SELLS and NEW YORK STOCK EXCHANGE, INC., Defendants.	Civil Action No. 72 Civ. 775 NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE that upon the complaint and affidavit of William E. Jackson sworn to April 25, 1972 (copies attached hereto), the undersigned will move this court on May 9, 1972 at Room 506, United States Courthouse, Foley Square, New York, New York at 10 A.M., or as soon thereafter as counsel may be heard, for an order pursuant to Rules 8(a) and 12(e), Federal Rules of Civil Procedure, directing plaintiffs to serve and file a more definite statement in the form of an amended complaint alleging:

a. What the jurisdictional basis is for the claim asserted against defendant New York Stock Exchange, Inc.;

b. What statute or principle of common law gives to plaintiffs a claim upon which relief can be granted against defendant New York Stock Exchange, Inc.;

c. How defendant New York Stock Exchange, Inc. "encouraged" the transaction by which Francis I. duPont & Co.

acquired the Hirsch & Co. business, and plaintiffs became partners in F. I. duPont, Glore Forgan & Co.;

d. How defendant New York Stock Exchange, Inc. "approved" the transaction by which Francis I. duPont & Co. acquired the Hirsch & Co. business and plaintiffs became partners in F. I. duPont, Glore Forgan & Co.;

and for such other and further relief as is just and proper.

The ground for this motion is that plaintiffs' complaint is so vague and ambiguous that defendant New York Stock Exchange, Inc. cannot reasonably be required to frame a responsive pleading.

Dated: New York, N.Y.
April 25, 1972

Yours, etc.

MILBANK, TWEED, HADLEY & McCLOY

By William E. Jackson
(A member of the firm)
1 Chase Manhattan Plaza
New York, New York 10005
Attorneys for defendant
New York Stock Exchange, Inc.

TO:

SHEA, GOULD, CLIMENKO & KRAMER, ESQS.
330 Madison Avenue
New York, N.Y. 10017
Attorneys for plaintiffs

Affidavit of Jackson, pp. 1076a - 1077a

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HOWARD C. HIRSCH, PAUL L. KOHNS and MARSHALL S. MUNDHEIM, Plaintiffs, -against- EDMOND duPONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., F. I. duPONT, GLORE FORGAN & CO., duPONT GLORE FORGAN INCORPORATED, HASKINS AND SELLS and NEW YORK STOCK EXCHANGE, INC., Defendants.	Civil Action No. 72 Civ. 775 AFFIDAVIT IN SUPPORT OF MOTION FOR A MORE DEFINITE STATEMENT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

WILLIAM E. JACKSON, being duly sworn, deposes and says:

1. I am a member of the firm of Milbank, Tweed, Hadley & McCloy, attorneys for defendant New York Stock Exchange, Inc. (the "Exchange"). I have read the complaint herein and make this affidavit in support of the Exchange's motion for a more definite statement.

2. The only references to alleged acts or omissions by the Exchange in the complaint appear in paragraphs 10 and 17. Paragraph 10 alleges that the Exchange participated in "discussions" in regard to the transfer of the assets of plaintiffs' business. (Certain of the other defendants are alleged to have made misrepresentations to plaintiffs in connection with that transaction.) Paragraph 17 alleges:

"At or prior to July 1, 1970, defendant New York Stock Exchange, Inc. knew or had reason to know the truth with respect to the matters hereinabove set forth in paragraph '13' [alleged misrepresentations by other defendants] but did not disclose this information to Hirsch & Co. or to plaintiffs. Defendant New York Stock Exchange, Inc. failed to warn and advise against the transaction but expressly encouraged and approved the transaction by which Francis I. duPont & Co. acquired the Hirsch & Co. business, and plaintiffs became partners in F. I. duPont, Glore Forgan & Co. because the said New York Stock Exchange feared that if the said transaction was not consummated and the Hirsch capital and business not infused into Francis I. duPont & Co., the said Francis I. duPont & Co. would fail and thereby possibly cause the failure of other Stock Exchange member firms with consequent widespread loss of public confidence in the Exchange."

3. It is impossible to frame a responsive pleading to the claim asserted in the complaint against the Exchange because that claim is so vague and ambiguous that it cannot be determined a) what jurisdictional basis, if any, exists; b) what statute or principle of common law is alleged to have been violated so as to give plaintiffs a claim upon which relief can be granted; c) how the Exchange "encouraged" the transaction by which Francis I. duPont & Co. acquired the business of Hirsch & Co., and plaintiffs became partners in F. I. duPont, Glore Forgan & Co.; and d) how the Exchange "approved" said transaction.

4. In addition, because of the vagueness and ambiguity of the claim pleaded against the Exchange, it is impossible to determine what defenses are available and required to be pleaded under Rules 8(c) and 12(b) of the Federal Rules of Civil Procedure or what motions directed to the complaint are available to the Exchange.

William E. Jackson
William E. Jackson

Sworn to before me this
25th day of April, 1972.

Russell R. Brooks

RUSSELL R. BROOKS
Notary Public, State of
[illegible]

Pre-trial Order, pp. 1078a - 1086a

p. 1078a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

HOWARD C. HIRSCH, PAUL L. KOHNS and MARSHALL S. MUNDHEIM,

Plaintiffs,

-against-

EDMOND duPONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., F.I. duPONT, GLORE FORGAN & CO., duPONT GLORE FORGAN INCORPOPATED, HASKINS & SELLS and NEW YORK STOCK EXCHANGE, INC.,

Defendants.

72 Civ. 775 (RLC)

PRETRIAL ORDER

- x

The attorneys for the parties in this action, having appeared before this Court at a pretrial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure, hereby stipulate and agree, subject to the order of this Court, as follows:

1. The trial of this action shall be based upon this pretrial order and the pleadings.

2. Pursuant to an agreement settling a related action in Supreme Court, New York County, this action has been dismissed with prejudice as between plaintiffs and defendants Edmond duPont, Wallace C. Latour, Milton A. Speicher, Francis I. duPont & Co., F.I. duPont, Glore Forgan & Co. and duPont Glore Forgan Incorporated. Pursuant to that settlement agreement $360,000 was paid by or on behalf of the settling defendants to plaintiffs, and such settlement amount was allocated among plaintiffs as follows:

$125,000	to plaintiff Howard C. Hirsch
$100,000	to plaintiff Paul L. Kohns
$100,000	to plaintiff Marshall S. Mundheim
$ 35,000	to Shea Gould Climenko Kramer & Casey for legal fees

Plaintiffs contend that the aforesaid amounts received in settlement, less attorney's fees, may be used to reduce the claims to be tried in this action. Defendants contend that the aforesaid amounts received in settlement, including attorney's fees, must be used to reduce the claims to be tried in this action.

3. Plaintiffs' damage claims based upon the decision of this Court dated June 5, 1975 subject to reargument and/or appeal by any party, to be resolved at trial, as reduced by the settlement amounts, excluding attorney's fees, allocated to each plaintiff, are as follows:

Federal Fraud Claims

Howard C. Hirsch	$175,000.00
Paul L. Kohns	$378,861.12
Marshall S. Mundheim	$378,861.12

Section 6 Claims

Howard C. Hirsch	$175,000.00
Paul L. Kohns	$575,000.00
Marshall S. Mundheim	$575,000.00

State Law Claims

Howard C. Hirsch	$175,000.00
Paul L. Kohns	$575,000.00
Marshall S. Mundheim	$575,000.00

The federal fraud claims of Paul L. Kohns and Marshall S. Mundheim shown above reflect reduction by an amount equal to their respective shares of the settlement multiplied by a fraction, the numerator of which is the amount of their limited partnership interest in F.I. duPont, Glore Forgan & Co., and the denominator of which is the amount of their total interest in F.I. duPont, Glore Forgan & Co. Defendants do not agree, however, that plaintiffs would be entitled to such amounts even were they to prove liability.

4. The following facts are not in dispute in this action, except that each party reserves the right to object at trial to the relevancy or materiality of any such fact:

* *

(a) Plaintiff Howard C. Hirsch ("Hirsch") was a general partner in the firm of Hirsch & Co. prior to July 2, 1970.

(b) Plaintiff Paul L. Kohns ("Kohns") was a general partner in the firm of Hirsch & Co. prior to July 2, 1970.

(c) Plaintiff Marshall S. Mundheim ("Mundheim") was a general partner in the firm of Hirsch & Co. prior to July 2, 1970.

(d) The firm of Hirsch & Co. was, prior to July 2, 1970, a partnership and a member firm of the New York Stock Exchange (the "Exchange").

(e) Hirsch, Kohns and Mundheim were, prior to July 2, 1970, allied members of the Exchange.

(f) Kohns was a general partner in the firm of F.I. duPont, Glore Forgan & Co. ("FIDGF") between July 2, 1970 and December 31, 1970.

(g) Mundheim was a general partner in FIDGF between July 2, 1970 and December 31, 1970.

(h) Hirsch was a limited partner in FIDGF between July 2, 1970 and December 31, 1970.

(i) Mundheim was, between July 2, 1970 and December 31, 1970, an allied member of the Exchange.

(j) Kohns was, between July 2, 1970 and December 31, 1970, an allied member of the Exchange.

(k) Subsequent to July 2, 1970, Hirsch ceased to be an allied member of the Exchange and became an approved person holding a limited partnership interest in FIDGF.

(l) Defendant Francis I. duPont & Co. ("FID&Co.") was, prior to July 2, 1970, a partnership and a member firm of the Exchange.

(m) Glore Forgan Staats, Incorporated ("Glore Forgan") was, prior to July 2, 1970, a corporation organized pursuant to the laws of the State of New York and a member corporation of the Exchange.

(n) Defendant F.I. duPont, Glore Forgan & Co. was, subsequent to July 2, 1970, a partnership and a member firm of the Exchange.

(o) Defendant duPont Glore Forgan Incorporated ("DGF, Inc.") was a corporation organized pursuant to the laws of the State of Delaware, and was a member corporation of the Exchange from and after May 14, 1971.

(p) Defendants Edmond duPont ("duPont"), Wallace C. Latour ("Latour") and Milton A. Speicher ("Speicher") were, prior to July 2, 1970, general partners of FID&Co.

(q) duPont, Latour and Speicher were, subsequent to July 2, 1970, general partners of FIDGF.

(r) Defendant Haskins & Sells ("H&S") was, and is, a New York partnership of certified public accountants conducting a practice in the State of New York and elsewhere.

(s) The Exchange was, and is, a Not-For-Profit Corporation organized pursuant to the laws of the State of New York and a national securities exchange registered with the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934.

(t) Edward J. Lill ("Lill") was, and is, a certified public accountant and a member of H&S.

(u) Harold J. Petrillo ("Petrillo") was, and is, a certified public accountant, and was a member of H&S.

(v) FIDGF was organized on July 2, 1970 as the successor to FID&Co., Glore Forgan and Hirsch & Co.

(w) At various times, H&S performed specified services as certified public accountants for Hirsch & Co. including audit examinations of, and the issuance of reports upon, financial statements of Hirsch & Co. as required by the rules of the Exchange and the Securities and Exchange Commission.

(x) At various times, H&S performed specified services as certified public accountants for FID&Co. including audit examinations of, and the issuance of reports upon, financial statements of FID&Co. as required by the rules of the Exchange and the Securities and Exchange Commission.

(y) At various times, H&S performed specified services as certified public accountants for FIDGF including audit examinations of, and the issuance of reports upon, financial statements of FIDGF as required by the rules of the Exchange and the Securities and Exchange Commission.

FACTUAL ISSUES

Plaintiffs contend that the following are the issues to be tried:

1. Did defendants Exchange and/or H&S misrepresent or omit to inform plaintiffs of material facts about FID&Co. known to said defendants in connection with plaintiff's acquisition of their interests in FIDGF? Did they know of and fail to warn against a misrepresentation or material omission made by FID&Co., or any representative thereof?

2. (a) Did defendant Exchange have knowledge of substantial and continuing violations of FID&Co. of the net capital and recordkeeping rules of the Exchange at material times prior to July 2, 1970 and fail to enforce such rules but instead did permit FID&Co. to continue in business and to merge with Hirsch & Co. and Glore Forgan Staats on or about July 2, 1970?

(b) Did defendant H&S knowingly participate in or act in concert with defendant Exchange in connection with the Exchange's failure to enforce its rules as hereinabove set forth in "2(a)"?

3. Did the acts and omissions of defendants found under "1" and "2" above cause financial injury to the plaintiffs, and in what amount?

Defendants contend that the following are the factual issues to be tried:

1. What was the condition of FID&Co. prior to July 2, 1970?

2. What knowledge did plaintiffs have of the condition of FID&Co. prior to July 2, 1970?

3. What knowledge did H&S have of the condition of FID&Co. prior to July 2, 1970?

4. What knowledge did the Exchange have of the condition of FID&Co. prior to July 2, 1970?

5. Did plaintiffs fulfill their duty of due care by seeking to learn prior to July 2, 1970 the condition of the firm in which they were purchasing their partnership interests?

6. Did FID&Co. or any representative thereof make statements to plaintiffs in connection with plaintiffs' investment in FID&Co. which contained untrue statements of fact or omitted to state facts necessary in order to make the statements

which were made true?

(a) Did plaintiffs know such statements to be untrue at the time or know of the omitted facts?

(b) Were such untrue statements or omissions material?

(c) Did plaintiffs rely on the untrue or misleading statements of fact made by FID&Co.?

7. Were H&S and/or the Exchange parties to the transaction by which Mundheim and Kohns became partners and Hirsch became a limited partner in FID&Co.?

8. Did H&S and/or the Exchange make statements to plaintiffs in connection with plaintiffs' proposed partnerships in FIDGF which contain untrue statements of fact or omitted to state facts necessary in order to make the statements which were made true?

9. If so, did plaintiffs know, or should they have known, such statements were untrue at the time, or did they know or should they have know of the omitted facts?

10. Were such untrue statements or omitted facts, if any, material?

11. Did plaintiffs rely on the untrue or misleading statements of fact, if any?

12. Did H&S and/or the Exchange either know the statements made were untrue or know of or recklessly disregard the existence of omitted facts which if disclosed would have shown that the statements made were untrue?

13. Did H&S and/or the Exchange know or have reason to know what information about FID&Co. was or was not communicated or otherwise made available by FID&Co. to plaintiffs?

14. Did H&S and/or the Exchange either (i) know FID&Co. made untrue statements or omissions, or (ii) recklessly

ignore facts which would have provided such knowledge?

(a) Were such untrue statements or omissions by FID&Co. material?

(b) Did plaintiffs rely on such untrue or misleading statements of fact made by FID&Co.?

15. Did H&S and/or the Exchange knowingly give substantial assistance or encouragement in respect to any misrepresentation or omission made to plaintiffs by FID&Co. in connection with plaintiffs' proposed partnership in FID&Co.?

16. Did H&S and/or the Exchange intend that plaintiffs would act or refrain from acting on the basis of false representations of material fact made by H&S and/or the Exchange which H&S and/or the Exchange knew to be false at the time made, or did H&S and/or the Exchange intend that plaintiffs would act or refrain from acting on the basis of omissions of material facts by H&S and/or the Exchange which H&S and/or the Exchange otherwise had a duty to supply to plaintiffs and which H&S and/or the Exchange knew to be necessary in order to make statements made to plaintiffs by H&S and/or the Exchange true?

17. If plaintiffs prove liability, what was the value of the partnership interests which they purchased, respectively?

18. Did plaintiffs, with full knowledge, fail to exercise due diligence to avail themselves of opportunities to withdraw their investments from risk?

Dated: New York, New York
June , 1975

Consented to:

SHEA GOULD CLIMENKO KRAMER & CASEY

By _____
(A Member of the Firm)
330 Madison Avenue
New York, New York 10017
Attorneys for Plaintiffs

CAHILL GORDON & REINDEL

By _____
(A Member of the Firm)
80 Pine Street
New York, New York 10005
Attorneys for Defendant
Haskins & Sells

MILBANK, TWEED, HADLEY & McCLOY

By _____
(A Member of the Firm)
One Chase Manhattan Plaza
New York, New York 10005
Attorneys for Defendant
New York Stock Exchange, Inc.

SO ORDERED:

June , 1975

_____

Affidavit of Spinogatti, pp. 1087a - 1088a

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HOWARD C. HIRSCH, PAUL L. KOHNS and MARSHALL S. MUNDHEIM, Plaintiffs, -against- EDMUND duPONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., F. I. duPONT, GLORE FORGAN & CO., duPONT GLORE FORGAN INCORPORATED, HASKINS AND SELLS and NEW YORK STOCK EXCHANGE, INC. Defendants.	Civil Action No. 72 Civ. 775 AFFIDAVIT

RICHARD L. SPINOGATTI, being duly sworn, deposes and says:

1. I am an associate with SHEA GOULD CLIMENKO & KRAMER, attorneys for plaintiffs in the above captioned action.

2. I submit this affidavit in opposition to the motion of defendant, New York Stock Exchange, Inc., for a more definite statement.

3. In its notice of motion, defendant New York Stock Exchange, Inc. asks for a more definite statement in the form of an amended complaint which would provide answer to four specific questions.

4. The first question seeks the jurisdictional basis for the claim asserted against New York Stock Exchange, Inc. In answer to said question, I assert that the jurisdictional bases for the claim asserted against defendant New York Stock Exchange, Inc. are § 22 of the Securities Act of 1933 (15 USC § 77v), § 27 of the Securities Exchange Act of 1934 (15 USC § 78aa) and the principle of pendent jurisdiction.

5. The first part of the second question seeks the statute which gives plaintiffs a claim upon which re lief may be granted against defendant New York Stock Exchange, Inc. In answer to said question, I assert that Section 10b of the Securities Exchange Act of 1934 (15 USC § 78j), the rules and regulations of the Securities and Exchange Commission promulgated thereunder and Section 17 of the Securities Act of 1933 (15 USC § 77q) are such statutes.

6. As to the second part of the second question, and the third and fourth questions asked by defendant New York Stock Exchange, Inc., more definite statements are unnecessary and the court is respectfully referred to the memorandum of law submitted in opposition to this motion.

Richard L. Spinogatti
RICHARD L. SPINOGATTI

Sworn to before me this
6th day of June , 1972.

ANN SINGERMAN
Notary Public, State of New York
No. 31-3437100
Qualified in New York County
Term Expires March 30, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HOWARD C. ATKINSON, PAUL L. KORNS and MARSHALL S. MUNDHEIM,

Plaintiffs,

-against-

EDMUND ORGILL, WALLACE C. LATCH, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., E. I. duPONT, GLORE FORGAN & CO., duPONT GLORE FORGAN, INCORPORATED, HASKINS AND SELLS and NEW YORK STOCK EXCHANGE, INC.,

Defendants.

NOTICE OF MOTION AND AFFIDAVIT

CHADBOURNE, PARKE, WHITESIDE, WOLFF, HADLEY & McCLOY
ATTORNEYS FOR Defendant New York Stock Exchange

RECEIVED

SIDNEY A. COULD, CLERK

Jan 28, 1972

Motion granted as to items (a) and (b), Notice of motion, April 29, 1972. See Fed. R. Civ. P. 5(a)(1). Alternative motion is denied. Gant v. Bangomatic Co., 267 F. Supp. 301 (S.D.N.Y. 1966).

So Ordered

U.S. DISTRICT JUDGE

Memorandum Order, pp. M89a - 109a

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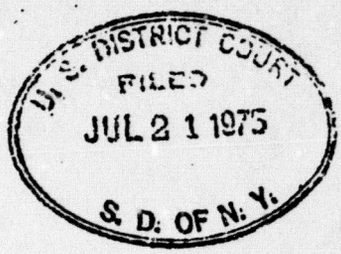
June 28, 1972

Motion granted as to items (a) and (b), Notice of Motion April 25, 1972. See Fed. R. Civ. P. 8(a)(1). Otherwise the motion is denied. Gann v. Berngomatic Corp., 262 F. Supp. 301, 304 (S.D.N.Y. 1966)

So ordered.

Order #42825, pp. 1091a - 1097a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



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HOWARD C. HIRSCH, PAUL L. KOHNS and MARSHALL S. MUNDHEIM,

Plaintiffs,

- against -

EDMOND duPONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., F. I. duPONT, GLORE FORGAN & CO., duPONT GLORE FORGAN INCORPORATED, HASKINS AND SELLS and NEW YORK STOCK EXCHANGE, INC.,

Defendants.

72 Civ. 775

#42825

- x

A P P E A R A N C E S:

Messrs. Shea, Gould, Climenko & Kramer
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Attorneys for Plaintiffs

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by Russell E. Brooks, Esq.
Attorneys for Defendant
New York Stock Exchange

Messrs. Cahill, Gordon & Reindel
80 Pine Street
New York, New York 10005
by David R. Hyde, Esq.
James P. Tracy, Esq.
Attorneys for Defendant
Haskins and Sells

APPEARANCES: (Continued)

Messrs. Pollack & Singer
61 Broadway
New York, New York 10004
Attorneys for Defendants
Francis I. duPont & Co.,
F. I. duPont, Glore Forgan &
Co., and Milton A. Speicher

Messrs. Weil, Gotshal & Manges
767 Fifth Avenue
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Attorneys for duPont Glore Forgan, Inc.

Messrs. Rogers & Wells
200 Park Avenue
New York, New York 10017
Attorneys for Defendant
Wallace C. Latour

Messrs. Cadwalader, Wickersham & Taft
One Wall Street
New York, New York 10005
Attorneys for Defendant
Edmund duPont

CARTER, District Judge

O P I N I O N

In this case plaintiffs charge the New York Stock Exchange (NYSE) and Haskins and Sells (H&S) with a violation of Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C.§78j(b)) and Rule 10b-5 (17 C.F.R. §240.10b-5) of the Securities and Exchange Commission for failure to disclose material information and for providing plaintiff with false and misleading information concerning the financial status of Francis L duPont & Co. (duPont) when plaintiffs dissolved their firm and joined forces with duPont as general and limited partners. Defendants NYSE and H&S have filed cross-claims against Francis I. duPont & Co., F. I. duPont, Glore Forgan & Co., duPont Glore Forgan, Inc., Edmond duPont, Wallace C. Latour, and Milton A. Speicher. The case was tried to the court without a jury June 18 - June 24 and June 30. At the close of the plaintiff's case, defendants NYSE and H&S advised the court that they planned to produce no evidence in respect of their cross-claims which had not already been produced in the course of the plaintiffs' case. Defendants Francis I. duPont & Co., F. I. duPont, Glore Forgan & Co. and Milton Speicher moved in open court to dismiss the cross-claims and subsequently defendants Edmund duPont and Wallace C. Latour made similar motions.

The NYSE and H&S assert that the evidence presented by plaintiffs in the principal case is not sufficient to support either plaintiffs' claims against them or their cross-claims against other defendants. However, they assert that if the court should find them liable on this evidence, they are entitled to contribution from the defendants against whom the cross-claims were filed. While this contention is surely correct as an abstract proposition, to succeed on a cross-claim the claimant must establish his right to contribution. See Odette v. Shearson-Hammill & Co., Inc., CCH Fed. Sec. L. Rep. ¶95,038 (S.D.N.Y. 1975); Globus v. Law Research Service, Inc., 318 F. Supp. 955 (S.D.N.Y. 1970), aff'd, 442 F. 2d 1346 (2d Cir), cert. denied, 404 U.S. 941 (1971). As the plaintiffs in the case-in-chief must sustain the burden of proof in respect to the liability claimed, defendants in turn must sustain the burden of proof in respect of their asserted entitlement to contribution in a cross-claim.

(X) Whatever may be held to be the liability of the NYSE and/or H&S to the plaintiffs, there has not been a scintilla of evidence in this record to warrant a holding in this case that NYSE and H&S have sustained their burden of proof in respect of their cross-claims. The evidence is undisputed that nothing was withheld

from the plaintiffs by duPont or any of its partners or by any defendants against whom a cross-claim has been filed. Plaintiffs received whatever they asked for, and none of the evidence supplied was false or misleading or tended to give plaintiffs a false picture of duPont's financial status. Moreover, there is no evidence that duPont withheld anything about the true nature of its financial status or back office problems from NYSE or H&S. Indeed NYSE and H&S were fully aware of duPont's financial problems at the time.

H&S were certified accountants for both Hirsch & Co. (plaintiffs' firm prior to merger with duPont) and duPont. One of the partners in the firm, Harold V. Petrillo, was senior accountant on Hirsch & Co.'s and duPont's 1969 audits. There is no evidence that duPont withheld any information from H&S in respect of the 1969 audit, or gave any false and misleading information to the accountants.

Moreover, part of plaintiffs' claim against H&S is based on Petrillo's action in assuring plaintiffs that duPont's financial and back office problems were inconsequential. At a meeting of some of the partners and employees of Hirsch & Co. prior to the effective date of plaintiffs' merger with duPont, objections were raised concerning the proposed merger. The back office problems

and other distortions evidenced in duPont's financial statement were pointed out. Petrillo discounted these fears and concerns and gave assurances that all was well at duPont. The plaintiffs assert that because they had confidence and relied upon Petrillo's action, this circumstance helped to persuade them to disregard the concerns and fears of their own people. Nobody from duPont was at this meeting. There is no evidence that anyone at duPont had any hand in having Petrillo make these comforting representations to plaintiffs; nor is there evidence that any of the defendants against whom cross-claims were made were involved in any way with Petrillo's representations.

In sum defendants have not sustained their burden of showing their entitlement to any contribution. In addition as to H&S conceivably liability to the plaintiffs could be found to exist based on Petrillo's representations, and as has been indicated no responsibility for those representations has been traced to duPont or any of its partners. Under the circumstances, this is a case where prior to determination of the liability of NYSE and H&S to plaintiffs, the formers' cross-claims must be dismissed as not proved.

The case-in-chief has been submitted but has not yet been decided. Therefore the court will refrain from directing entry of judgment under Rule 54(b) as to any part of the case until the whole case is disposed of.

It is SO ORDERED.

Dated: New York, New York
July 18, 1975

Robert L. Carter

ROBERT L. CARTER
U.S.D.J.

Order & Judgment, pp. 1098a - 1099a

p. 1098a

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HOWARD C. HIRSCH, PAUL L. KOHNS and MARSHALL S. MUNDHEIM, Plaintiffs, -against- EDMOND duPONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. duPONT & CO., F. I. duPONT, GLORE FORGAN & CO., duPONT GLORE FORGAN INCORPORATED, HASKINS & SELLS and NEW YORK STOCK EXCHANGE, INC., Defendants.	72 Civ. 775 (RLC) ORDER AND JUDGMENT

Upon the Opinion of the Court filed herein on July 6, 1976, it is hereby

ORDERED, that the amended complaint be and the same hereby is dismissed on the merits and with prejudice as to defendants New York Stock Exchange, Inc. and Haskins & Sells; and it is further

ORDERED, that the contingent cross-claims for indemnification and contribution of defendants New York Stock Exchange, Inc. and Haskins & Sells against defendants Edmond duPont, Wallace C. Latour, Milton A. Speicher, Francis I. duPont & Co., F. I. duPont, Glore Forgan & Co. and duPont Glore Forgan Incorporated be and the same hereby are dismissed on the grounds of mootness; and it is further

ORDERED, that defendants New York Stock Exchange, Inc. and Haskins & Sells recover their costs in this action to be taxed against the plaintiffs herein by the Clerk; and it is further

ORDERED, that the Clerk of the Court enter judgment accordingly.

Dated: New York, New York
July , 1976

U.S.D.J.

Judgment entered this
day of , 1976

Clerk

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HOWARD C. HIRSCH, PAUL L. KOHNS and MARSHALL MUNDHEIM,

Plaintiffs,

vs.

HASKINS & SELLS, INC., THE NEW YORK STOCK EXCHANGE, INC., EDMOND DU PONT, WALLACE C. LATOUR, MILTON A. SPEICHER, FRANCIS I. DU PONT & COMPANY, F. I. DU PONT, GLORE FORGAN & COMPANY, DU PONT GLORE FORGAN, INC.,

Defendants.

72 Civ. 775

Before:

HON. ROBERT L. CARTER,

District Judge.

June 17, 1975
12:25 p.m.

APPEARANCES:

SHEA GOULD CLIMENKO & KRAMER, ESQS.,
Attorneys for plaintiffs
BY: SHELDON D. CAMHY, ESQ.,
RICHARD SPINOGATTI, ESQ., of counsel.
CAHILL GORDON SONNETT REINDEL & OHL, ESQS.,
Attorneys for defendant Haskins & Sells, Inc.
BY: DAVID R. HYDE, ESQ., of counsel.

cmr

MILBANK, TWEED, HADLEY & Mc CLOY, ESQS.
Attorneys for Defendant New York Stock Exchange, Inc.
BY: RUSSELL BROOKS, ESQ.
SAMUEL H. GILLESPIE, III, ESQ.
TONI LICHSTEIN, ESQ., of Counsel.

POLLACK & SINGER, ESQS.,
Attorneys for Defendants Milton A. Speicher,
F. I. duPont Co., F. I. duPont Glore Forgan & Co.
BY: BARRY H. SINGER, ESQ.
STEVEN W. BERGER, ESQ., of Counsel.

ROGERS & WELLS, ESQS.,
Attorneys for Defendant Wallace C. Latour
BY: JAMES MAONEY, ESQ.,
PHILIP DICKSON, ESQ.,
PAUL E. DIXON, ESQ., of Counsel.

CADWALADER WICKERSHAM & TAFT, ESQS.
Attorneys for Defendant Edmond duPONT
BY: GRANT B. HERING, ESQ., of Counsel.

THE COURT: Mr. Pollack, have you gentlemen reached any agreement on the matter that you were down here discussing with me sometime ago?

MR. POLLACK: I am sorry, your Honor, I didn't hear.

THE COURT: Have you reached any agreement on the matter that --

MR. POLLACK: No, we have not, your Honor.

THE COURT: The matter we were discussing earlier.

MR. POLLACK: We have attempted to reach an agreement but none has been reached.

THE COURT: Well, what is the --

MR. POLLACK: I think that our feeling is that as long as cross claims are going to be maintained that our client is at least theoretically at risk and we must attend this trial and cross-examine.

MR. HERING: Your Honor, may I speak? Mr. Hyde, representing Haskins & Sells distributed a stipulation which I have modified very slightly, and speaking for our client only his stipulation as I have modified it slightly is acceptable and I would be glad to give your Honor a copy of it and let other defendants speak for themselves.

THE COURT: Mr. Hering, I am not sure -- this stipulation may be satisfactory to you but I am not sure it's satisfactory to me. I think that I explained, I don't remember whether you were here or not --

MR. HERING: I was.

THE COURT: Well, I explained to you at that time that what I really wanted done in this case was to have all the evidentiary matters that I was going to have to consider included and I want to of course do my best to cooperate with you gentlemen and not have you sitting around here needlessly but I don't propose to be forced to at the conclusion and 30 days hence and sometime in the fall to be required to sit on this trial again.

What I had really hoped was that some arrangements could be worked out where the whole matter, the cross-claims and all the counterclaims, could be -- whether I have to consider them eventually or not you know is another matter. How long is this trial going to take, Mr. Camhy?

MR. CAMHY: Your Honor, my name is Sheldon Camhy, I represent the plaintiffs.

THE COURT: I called you Mr. Camhy.

MR. CAMHY: It's the sound, your Honor, I am

sorry. I anticipate that my part of it should take between five and six days.

I also anticipate that because most of the witnesses that I plan to call are defendants or employees of defendants your Honor may for purposes of convenience permit defendants to bring out a lot of their case on cross-examination of the witnesses that I call, and thatcould make it take considerably longer.

But the part that I would use would be probably five to six days.

THE COURT: I think I ought to advise you for your own plans that I will have to interrupt this, if it goes beyond Tuesday, that I will have to interrupt it for the rest of the week. In other words, it will go through the rest of this week and through Tuesday of next week, and if it has to continue beyond that period of time we'll have to set a time. I will be in part I for two weeks beginning Monday, June 30th.

But since this is a trial without a jury we will just have to set the time in which we can hear evidence. We will be able to hear it part of this week.

Well, I gather we are not going to be able

to resolve the problem.

MR. HERING: Your Honor, I do have an executed stipulation between only the stock exchange and Edmond DuPont which dismisses without prejudice the cross-claims. I take it from your comments that that's even less acceptable.

THE COURT: Yes.

MR. HERING: I would be glad to present it to you.

THE COURT: I think that the only thing I am going to be really happy with, frankly, is an assurance that all ofthese claims have been resolved in this litigation. I really hate to keep you people here if you can't resolve it but it seems as if you can't. I think that if there are going to be any cross-claims I don't want to be faced with the prospect of parts of this case lingering in the woods later. I want it all settled now. And I gather from that that the only thing I can do is, you gentlemen can't agree on a formula and I have been unable to think of one so I suppose we'll have to proceed, Mr. Hering.

MR. HYDE: Your Honor, my name is David Hyde, I appear for Haskins & Sells. As Mr. Hering indicated, I circulated a stipulation last week

which I hoped would accomplish what your Honor had in mind. I think the problem, your Honor, alluded to is one of timing as to when the cross-claims should be taken up for consideration. If I understand your Honor correctly you would prefer to take them up after the main case without waiting as Mr. Hering had proposed until there is a judgment and appeal and so on.

THE COURT: Well, that doesn't solve the whole problem because I think as Mr. Pollack has indicated some of these claims may be a part -- or he will have to meet some of the evidence as a part of the case and he wants to be here to protect his client.

MR. HYDE: I think his problem is this, your Honor, he would want to participate in some cross-examination of the witnesses, I would assume. Let us say that my client, Mr. Lill, who is scheduled to be the plaintiff's first witness, testifies, as he has indicated he will, his testimony will go in, he will be cross-examined by myself and Mr. Brooks on behalf of the stock exchange.

Now, let us say that Mr. Pollack is absent. We will have a record, of course, prepared. We intend to order daily copy. At the conclusion of the trial Mr. Pollack would have an opportunity to look at the

testimony that was given by Mr. Lill and then if he wishes to call him back for cross-examination with respect to the cross-claims he could do so. The point being that we would not have to spend all of the time that Mr. Lill has been on the stand going over all of his testimony again. It would only be cross-examination with respect to the cross-claims such as Mr. Pollack wishes to conduct. I think if that were done his rights would be fully preserved.

He would have the right of cross-examination and the only thing would be that he is not physically present during Mr. Lill's direct testimony and his cross-examination by myself and Mr. Brooks. I would propose that as a solution, your Honor.

MR. HERING: Speaking just for defendant Du Pont we would accept that your Honor.

MR. MALONEY: So would defendant Latour, your Honor. Provided we can call a witness back for additional cross-examination that would not be duplicative of what had gone on before. I think with this hiatus that's going to result in the other part it will give us the two weeks to review the daily copy of the five or six days of the plaintiffs' case.

THE COURT: I am not giving two weeks, Mr. --

MR. MALONEY: Whatever period your Honor said you would have to suspend the trial.

THE COURT: Oh, yes, I will have to suspend the trial for three days beginning Wednesday, Thursday and Friday. Maybe that is, Mr. Pollack, does that look like a reasonable solution to you?

MR. POLLACK: Your Honor, I would like to confer with our client before taking a position. Initially it seems to me that it presents a certain problem in that you may have in theory to recall every witness who has testified.

THE COURT: Well, Mr. Camhy, I don't see how you can object.

MR. CAMHY: Only this, your Honor, that if your Honor is going to consider the main case and not decide it

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until after you have heard the second part it seems to me I had better be here then. Now I don't mind coming back.

THE COURT: No, I don't think I am going to do that. I didn't mean to imply that. I am going to consider the main case as separate and apart from the counterclaim. The evidence on the main case I will consider. I am not going to be influenced by the counterclaim even though if Mr. Hyde's suggestion is accepted it will proceed immediately at the conclusion of the main trial.

MR. CAMHY: Your Honor, may I just pose an illustration? And by the way I have no objection to coming back. I want to make that clear.

THE COURT: Well, you are welcome. We have no problem. I was just trying to help Mr. Hyde and Mr. Pollack and Mr. Maloney who doesn't want to be here if they can help it.

MR. CAMHY: I do envision this, that I could put a witness on who would testify that he knew this or he knew that and I did that and this and he did that. And we could all conclude this trial and this is a complex trial with many exhibits, and I assume because it is a commercial matter it would be the kind of a matter you might wish to consider at some length before you reached your decision. You might want to decide it from the bench but you might

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want to look at the evidence.

THE COURT: I doubt I will decide it from the bench.

MR. CAMHY: If in the case of the cross claims additional cross-examination takes place which erodes the witness' testimony or changes it in any way it would seem to me that you would have that before you at the same time you were considering the main case. That would mean that I would have to be here. And if your Honor chooses to do it that way for the convenience of everybody I would go along with that.

THE COURT: Well, I don't think quite frankly that that would be fair. You may be here but I don't think that would be fair to you. What I have to do it seems to me is that anything that is presented in the main case there has been no erosion in respect of the main case, when the matters had an opportunity to examine and cross-examine, then the fact that what happens in the counterclaim, I am not going to be in a position in all fairness to hold that against you.

MR. CAMHY: Thank you, your Honor.

THE COURT: I would assume that if Mr. Hyde is going to demolish a witness in respect of his client he had better do it in the main case and not wait until any cross

claims, or wait for help from these other parties to do so in order to prevail with you. That's the only fair thing it seems to me that can be done. Although I will welcome you by all means, I wouldn't propose to place you at that kind of disadvantage. Well, it is now 20 of 1, why don't I give you until 2 o'clock -- the lunch hour by the way is 1 until 2 but I will give you 20 minutes today to see if you can settle this question and come back at 2 o'clock and see whether or not the arrangement is agreeable. If it isn't then what we will have to do is proceed with the main trial. Is that satisfactory? All right. Until 2 o'clock.

MR. CAMHY: Your Honor, there are some papers on these motions and the pre-trial memorandum which we have not filed. May we do it now?

THE COURT: Yes. I understand that you are filing a proposed amended complaint?

MR. CAMHY: Yes, with our requests.

THE COURT: And the defendants have answered it but I haven't seen the amended complaint as yet. I would like to get that. All right.

(Luncheon recess)

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AFTERNOON SESSION

2:10 P.M.

THE COURT: Mr. Hering. Both of you are rising, I don't know who --

MR. HERING: Well, your Honor, the proposal that Mr. Hyde made at the end of our session this morning is acceptable to Edmond Du Pont.

THE COURT: All right.

MR. HERING: And I would be willing to stipulate on the record or in a written stipulation to that effect.

MR. MALONEY: That is acceptable to the defendant Latour as well, your Honor.

MR. POLLACK: Your Honor, on behalf of the o Du Pont partnerships in liquidation and Milton A. Speicher we have concluded that we have no choice but to attend the trial. We do this reluctantly but nevertheless we feel that in order to offer the maximum protection to our clients it is important that we be here and we intend to stay through the trial.

MR. BROOKS: My name is Brooks. I represent the New York Stock Exchange, your Honor.

THE COURT: You are prepared to be here anyway, aren't you?

MR. BROOKS: I am prepared to be here but I have agree

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to stipulate to dismiss without prejudice against all of the other defendants we have asserted a cross claim against. I would like that to be known to the court.

MR. HERING: Your Honor, we happen to have a signed stipulation between the exchange and Edmond Du Pont to that effect. If your Honor would entertain it.

THE COURT: All right, gentlemen, it is your choice and as to Mr. Latour and Mr. Edmond Du Pont I want to make clear so there will be no misunderstanding that this agreement which you are electing to absent yourself from the trial of the main case and to study the record and at the close of the main case to be prepared to examine and recall any of the parties on the cross claim and counter-claim, I want it to be clear that if anyone is recalled who has already testified that your examination must be selective and will not -- will not cover ground that's already been covered in the main case. Although I will allow you to direct my attention to any matters in the main case that you want considered on your behalf, I am not going to have you reexamine these people on that ground. I want us to be certain that we understand that so that you don't leave here with any misconceptions.

MR. MALONEY: Might I ask a question, your Honor?

THE COURT: Yes.

MR. MALONEY: You say we cannot reexamine them on the area, I assume you mean we can't ask the same questions but if we feel there were three additional questions on that area that were not asked we would be allowed to ask those additional questions. We will not go over the entire area and rehash the entire testimony but if we feel someone has missed something which is not in the record we will be allowed to ask that.

THE COURT: Oh, yes, you may bring up any new matter, but you are not going to bring up the old matter by asking the same question in a different form.

MR. MALONEY: No, sir. Of course.

THE COURT: So that of course you and I may disagree as to whether this is a new matter or not but you will have to take your chances on that.

MR. MALONEY: Yes, sir.

THE COURT: All right. Well, with that understanding, Mr. Hering and Mr. Maloney, if we are sure we understand one another you may be excused.

MR. HERING: Thank you, your Honor.

MR. MALONEY: Thank you, your Honor.

(Mr. Hering and Mr. Maloney leave.)

THE COURT: All right. Now I think it is with Mr. Camhy.

MR. CAMHY: Your Honor, I have before you a request that we be permitted to introduce evidence, and it is the same evidence, your Honor, in support of a claim that the defendant, New York Stock Exchange violated Section 6 of the Securities and Exchange Act of 1934 by failing to take action against the Du Pont firm when it knew of facts which required that action. It has been our contention in this case that the exchange knew of specific facts relating to the condition of Du Pont dating back approximately a year prior to the merger which facts were not disclosed to plaintiffs when they purchased their interest. And that these facts should have been disclosed. We submit, your Honor, that the same facts will be proved, that is to say, we will show those facts of which they had knowledge and that the fundamental contention is that they did disclose what they knew. Now there would have been one way to disclose it which would have been to tell us. But another way to disclose it would have been simply to take action against Du Pont. And what we are saying is that implicit in their not taking action was the non-disclosure. That is to say, if they had taken action there would have been a disclosure. If they had taken action to suspend or to discontinue Du Pont's operations, we would have been on notice. Indeed, there may have been no Du Pont

firm. But the principal matters to be proved are precisely the same. We will show the same capital violations, we will show the same record keeping violations, we will show the same manner of handling them.

And one issue, is it a fact which should have been disclosed to us under Section 10-B and the other question is, were those facts which should have caused the exchange to act against Du Pont. In either case, your Honor, we say we are entitled to a recovery. So that we do not believe that there is any material change in the theory of this case. What happened, your Honor, was that since the date when this case was originally brought there were decisions in the Dempsey-Tegler case and in the Sloan case and in other cases which began to recognize a 6-B action right which had, to my knowledge at least not been asserted before. So while we were preparing the same case we realized that we had another statutory leg.

Now during the course of this case the defendants--

THE COURT: When did you realize that, Mr. Camhy? Yesterday?

MR. CAMHY: No, approximately six months ago, your Honor, or perhaps a year ago. A year ago, yes. When Mr. --

THE COURT: A year ago. But you mean it cogitated

in your mind for a year before you decided to act on it?

MR. CAMHY: No, your Honor, first, Mr. Brooks had suggested that he wanted to amend his answer. At that time we advised him that we would want to, as long as pleadings were being brought into shape, we would want to add a 6-B claim to the complaint. And we advised him of that in writing before any of this discovery was held. Then he never pursued the matter of amending the answer and it just kind of got lost. But when I thought about it before trial, say about a month or two ago I realized that the same facts in the complaint were basically there. That it was a new legal theory but legal theories don't go into complaints, statutory citations are not the key to a complaint. The key to a complaint is whether the facts relied upon put the defendant on notice. Now our complaint says that this firm was out of ratio and should have been suspended.

The complaint, the old complaint said that they did not disclose the facts but encouraged the merger in their own self-interest. Now both of those allegations are in the complaint. So it is alleged that they knew that they were out of ratio, knew they should have been suspended and it is alleged that they encouraged the merger notwithstanding those facts in their own self-interest.

THE COURT: What are the claims that are extant in the complaint as amended?

MR. CAMHY: The following.

THE COURT: The ones that are now before me, not your proposal. There is an amended complaint which we are-

MR. CAMHY: We are getting into semantics. Does your Honor want me to say what I think is inherent in it or-- I believe there is a 6-B claim in the complaint right now. There is a 10-B(5) claim and 10-B is cited in the complaint.

THE COURT: I am not asking you what specific claim are you making in the amended complaint. Not something that I am going to have to construe as being present which you have not alleged and as a matter of fact feel compelled to make the specific allegation about, I am not talking about that. I don't regard that as being semantics, by the way. What are your claims, what are they now? What claims are before me now?

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MR. CAMHY: In the amended or the original complaint, your Honor? In the proposed amended or in the existing complaint?

THE COURT: In the existing amended complaint.

MR. CAMHY: Correct. There is a claim in the existing amended complaint, your Honor, that DuPont -- that defendant New York Stock Exchange and Haskins & Sells knew that DuPont was out of ratio and had been for some time, and that it failed to disclose those facts. That it knew of basic major record keeping errors in DuPont and it failed to disclose those facts. And that these material non-disclosures were violations of section 10B of the Exchange Act.

In addition, it is alleged that Haskins & Sells, who were accountants for DuPont and for Hirsch & Company violated their duty as accountants and committed malpractice as accountants in not making the same disclosure.

THE COURT: That's it?

MR. CAMHY: Well, there is also a claim for common law misrepresentation against both defendants.

THE COURT: All right, I will hear from you, Mr. Hyde or Mr. Brooks.

MR. BROOKS: Your Honor, when we looked

at the initial complaint in this case in 1972 when it was filed we didn't know what to do, because it's clear that there was no statute or no recorded principle of law that the plaintiffs were claiming under. And we had two avenues of approach, we judged.

One would be to move to dismiss. And in this court we have learned that those motions are usually granted with leave to amend.

So we opted for the other alternative, a more definite statement so we could frame an answer and we could conduct an intelligent discovery program. We got an amended complaint, the Court granted the motion, that amended complaint was very clear, it cited two statutory provisions under which the plaintiffs were proceeding, section 10B of the Exchange Act and section 17 of the 33 Act. Both raise disclosure issues. We proceeded on that basis.

Mr. Camhy, in April of 1974, after our conference with your Honor in March of 1974 wherein your Honor told us by God, we had better get going and get our discovery in, sent me a letter and asked whether I would consider consenting to an amendment to the complaint to add a section 6 claim. My answer was no.

Thereafter we conducted our discovery program

on the amended complaint which was a disclosure complaint to which we had answered. I don't know what Mr. Camhy's purpose was when he conducted his discovery, but the discovery that he did conduct I did not believe that I had any reason to object to because a disclosure case indicated the question of what was the condition of the firm in which his clients invested.

I conducted no discovery in respect to any claims other than disclosure claims.

Then it seems that Mr. Camhy, when Haskins & Sells and the exchange made its disclosure case, suddenly decided he didn't need that amendment he requested my consent for and I referred to back in April because he contended his present amended complaint had a section 6 claim in it.

Your Honor ruled in your decision of June 5 that that was not the case, that the present complaint, the amended complaint pleaded only 10B and 17 claims. That is where we are here today.

On June 12 Mr. Camhy sent me a proposed second amended complaint which spelled out section 6 claim. But we contend, your Honor, that this is too late a day to change the basic nature of this case and that is what would happen if this amendment was allowed.

We have not conducted any discovery of the DuPont principals or their documents or the Haskins & Sells people or their documents with any idea of defending a claim for failure to regulate. Defending that claim takes about three times as much work and three times as long to defend as a failure to disclose claim.

I know. I have done it. I did it in the Hughes case which Mr. Camhy is referring to and I did it three weeks ago for four weeks before Judge Owen. A case called Murphy vs. McDonnell.

We are simply not prepared to meet that kind of claim. If Mr. Camhy feels prepared to prosecute that kind of case that was unknown to us on the way he proceeded in this case.

THE COURT: All right, I think I have got the point, Mr. Brooks.

Mr. Hyde, did you want to say anything?

MR. HYDE: Your Honor, I do not read this proposed second amended complaint to plead any section 6 cause of action against Haskins & Sells, so I am not directly affected. However, I would certainly oppose any amendment that is going to cause the prolongation of this trial which already I think promises to be long enough.

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THE COURT: All right.

MR. CAMHY: Your Honor, may I --

THE COURT: I have heard you. I doubt if there is very much more you can say -- do you want to say something else? By all means.

MR. CAMHY: Only that I don't think the proof will be one I ought to differ with and I will consent to any terms whatever in terms of time preparation that the defendants might want for purposes of being able to meet this, because I am certain that this is the exact same case and I would cheerfully put in my whole case and give them any amount of time they want to do anything they want because I know it's the same case.

THE COURT: Well, the motion is denied, I am denying it because I think that it's not fair to, on the eve of trial, to introduce an entirely new theory which had it been raised previously the defendant might have been able to have met it by a motion for summary judgment as they did in regard to the other claim.

They might have included it, which they did not do. And I am also denying it on the merits because I don't believe even, by virtue of what I have read in the allegations in your complaint in regard

to the proof would be that you are seeking to hold the exchange responsible and liable for efforts it's taken to enforce its rules and regulations which is in effect what you are doing.

And on that basis I would think that to allow you to amend thereafter to dismiss would be a futile act. So that on both bases the motion is denied.

Now, would you call your first witness.

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MR. HYDE: Your Honor, before the first witness is called there is one other preliminary matter I may raise with your Honor.

Mr. Brooks and I have moved for reargument on your Honor's decision to the summary judgment motion to the extent that it denies the motion with respect to the limited partnership interest.

In that connection, your Honor, I would like to hand up yesterday's decision of the United States Supreme Court in the Co-Op City case which is concerned with the question of what is and is not a security under the federal law. I cannot represent to your Honor that this directly concerns the point that your Honor decided, but I submit that it certainly does shed a lot of guidance in this whole area and we would urge your Honor on the basis of this decision and also the arguments put forth in the memorandum in support of the motion for reargument to reconsider the point as to whether or not a limited partnership interest in the context of this partnership, these plaintiffs who were also general partners, is indeed a security under the Federal Securities Act.

THE COURT: Well, I will be pleased to read the decision. I doubt that it's going to

have very much effect, but in any event I will read it, but I think that the prospect is 90 per cent at the present time without readint it that your motion will be denied. But I will announce it tomorrow.

MR. HYDE: This is only the majority opinion, your Honcr, I did not have the --

THE COURT: Well, the majority opinion prevails.

MR. HYDE: I would think so.

MR. BROOKS: Your Honor, may I make an application before we move on? I am ably assisted in this trial by Mr. Samuel Gillespie and Miss Toni Lichstein

Mr. Hyde is equally well assisted by Mr. James Tracy.

We would like to switch around the forest for the defense team and have them switch Mr. Gillespie and Mr. Tracy at this table and the defendants against whom only cross-claims are pending have them moved back here if that would not displease your Honor.

THE COURT: That is agreeable with me. Mr. Pollack, are you going to feel displaced?

MR. POLLACK: We would be happy to take an even more rear seat in this action, your Honor.

May I say in that regard,your Honor, that as a result of the rigors of the craxh program we find ourselves bouncing around to different courtrooms. Mr. Singer,my partner, and Mr. Berger, my associate, are here with me. If your Honor permits, we will attend different parts of this trial among ourselves.

THE COURT: That's fine. That is agreeable to me.

MR. POLLACK: Thank you very much.

THE COURT: By the way, that will not be agreeable to me when you are actively producing your counterclaim.

MR. POLLACK: Cross-claims.

THE COURT: Cross-claim.

MR. POLLACK: Thank you, your Honor.

MR. CAMHY: Your Honor, I would like to alert counsel as to the exhibits I am going to use so they can take them out and stack them up for use.

THE COURT: All right.

E D W A R D J. L I L L, called as a witness by the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CAMHY:

Q Mr. Lill, what is your profession?

A I am a certified public accountant.

Q How long have you been one?

A I have been with the firm 21 years. I have been certified for approximately 15 years.

Q Is Haskins & Sells one of the large accounting firms?

A Yes, it is.

Q Has it had considerable experience in securities firm work?

A Yes, it has.

Q Approximately how many partners in Haskins & Sells?

A Worldwide approximaely 400.

Q And in the New York office?

A Approximately 50.

Q Has your work been concentrated in the securities field?

A Yes, I have spent more than half of my total time in the securities industry.

Q Does that include audit work for member firms?

A Yes, it does.

Q Could you tell the Court a few of the major member firms for whom you have done audit work?

A I have done audit work for Merrill Lynch, Bache, E. F. Hutton, Francis I. duPont. Many others.

Q Was duPont a large firm at the time this case was involved, 1968, '69 and '70?

A Yes, it was.

Q One of the larger firms on Wall Street?

A Certainly one of the largest ten.

Q And principally in terms of branch offices and volume, is that correct?

A Yes.

MR. BROOKS: Your Honor, I am going to object to the question. I am not sure what Mr. Camhy means by volume.

THE COURT: Well, apparently Mr. Lill understood it.

MR. CAMHY: I was distinguishing between wealth or net worth and volume of business and size of operations.

THE COURT: All right.

Q How long prior to 1969 -- excuse me -- how long prior to June '70 had you been doing the duPont work? June 1970.

A Approximately one year.

Q Were you the partner in charge of the audit

of duPont which took place as at September 28, 1969?

A No, I was not.

Q What is the name of that partner?

A Harold Petrillo.

Q Is Mr. Petrillo active with Haskins & Sells?

A No, he is retired.

Q When did he retire?

A I believe it was sometime in 1970, '71.

Q Did you work on the 1969, September 28, 1969 audit?

A Yes, I did participate. That was the year of transition from Mr. Petrillo to myself.

Q So then you participated, if I may, as a responsible partner in that?

A I am not sure what you mean by a responsible --

Q Well, did you share a part of the responsibility with Mr. Petrillo?

A No, I did not. I was developing a background so I could take over that responsibility the following year.

Q Then you say Mr. Petrillo was the responsible partner?

A Yes, sir.

Q But you were a partner?

A Yes, sir.

Q How long had you been a partner?

A I became a partner in 1966.

Q Were there others at the firm who worked on this audit?

A Other partners?

Q No, other personnel of Haskins.

A Yes.

Q Approximately how many?

A An order of duPont -- pardon me -- an audit of duPont involved over 100 accountants.

THE COURT: Over 100 what?

THE WITNESS: Accountants.

Q In that connection did you come to meet and work with a Mr. Sam Gay at duPont?

A In 1969?

Q Yes.

A Yes.

Q Had you known Mr. Gay before that?

A I knew of him. I did not work with him before that.

Q Hadn't he been at Haskins & Sells?

A Yes.

Q Sometime in prior years?

A Yes.

Q And Mr. Petrillo knew him, didn't he?

A Yes.

Q I show you Plaintiffs' premarked Exhibit 26 and ask you whether that is a letter dated November 26, 1969, issued by Haskins & Sells attached to which is the balance sheet of duPont as at that date with your opinion stated below followed by part one of a questionnaire (handing).

A The exhibit is a little confusing to me. The top page is the opinion that goes with a questionnaire.

Q Yes.

A The second page is a statement of condition with an opinion on the bottom that does not go with that top sheet.

Q Well, this is the way your counsel submitted it to us, Mr. Lill.

A I am saying that the opinion on the top applies to the answers to financial questionnaire which begin on page 3. Page 2 is a separate document.

Q Fine. And with that qualification --

THE COURT: Excuse me.

Q -- are these authentic?

A They appear to be.

THE COURT: I think that, gentlemen, for the future I am going to be helped in understanding what is going on if you would supply me with copies of these exhibits.

MR. CAMHY: Your Honor, would you like us to stack them up in front ofyou the way we do in front of the witness so that as we offer them you can reach for them?

THE COURT: That is fine.

MR. CAMHY: Or would you prefer they be handed up one at a time?

THE COURT: No, any way that's convenient for you.

MR. CAMHY: All right.

Your Honor, subject to the qualification which Mr. Lill put on the record I offer Exhibit 26 into evidence.

MR. HYDE: No objection.

MR. BROOKS: Your Honor, I don't have any objection except I think we should note that this is only part of a document which has many other parts.

(Plaintiffs' Exhibit 26 was received in evidence)

MR. CAMHY: I respectfully call the Court's

attention to the accountant's opinion on the balance sheet which is the second page of this document. It's set forth horizontally.

THE COURT: All right.

BY MR. CAMHY:

Q Turning to the questionnaire, Mr. Lill --

MR. CAMHY: Excuse me, your Honor, before proceeding with the questionnaire.

Q Mr. Lill, would you look at the Plaintiff's Exhibit 20 premarked and Plaintiff's Exhibit 21 premarked, which are below?

Now, both, Mr. Lill, are printed presentations by duPont of financial statements and other data and my question to you is --

A I am sorry, Mr. Camhy, I have Exhibit 20 and --

Q 21. Do you have 21?

A No, sir.

Q Mr. Lill, my question to you is: In late 1969 and early 1970, was Haskins aware and did it approve of the use of the audited financial statement and printed opinion in the printed versions of the duPont annual report and annual financial statements which these exhibits are?

MR. BROOKS: I object to the form of the

question.

THE COURT: Objection is overruled. You may answer.

Q Yes, I believe we did.

MR. CAMHY: Your Honor, I would like to offer these two exhibits into evidence.

MR. HYDE: No objection.

MR. BROOKS: No objection.

(Plaintiffs' Exhibits 20 and 21 were received in evidence)

MR. CAMHY: I respectfully call to the Court's attention that both the balance sheets in each of the published financial statements in printed form bear the same accountant's opinion.

Q Mr. Lill, turning to the questionnaire --

THE COURT: I am sorry, gentlemen, excuse me a minute.

THE COURT: Proceed, Mr. Camhy.

T2B MR. CAMHY: I would like the last part of the question stricken. I don't know, do we have a part of a question on the record?

(Read)

MR. CAMHY: Would you strike that please?

Q Mr. Lill, would you look at Exhibit 109 pre-marked which is a letter dated November 26, 1969, attached to which is a capital computation and certain memoranda and correspondence: I ask you whether this is a memorandum of computation of net capital and aggregate indebtedness which was prepared by your firm and delivered to duPont for filing with the stock exchange.

A Yes, sir.

MR. CAMHY: I offer it into evidence.

MR. BROOKS: Can we find out whether the correspondence that was attached was attached at the time that Haskins & Sells sent this document to Francis I. duPont Co.? Otherwise I object to the admission of the two together.

Q Mr. Lill, were they attached?

A The correspondence was attached.

MR. CAMHY: Thank you.

MR. BROOKS: No objection.

MR. HYDE: No objection.

(Plaintiffs' Exhibit 109 received in evidence.)

Q Mr. Lill, would you explain to the court what a computation of net ratio is and what it is used for?

A A computation of net capital is a computation in accordance with a formula of the New York Stock Exchange that is prepared from the answers to the financial questionnaire which you presented as Exhibit 26.

Q Now, that computation of capital, is that for the purpose of a rule known as Rule 325?

A That is the rule that provides the formula and the instructions for the computation.

Q To the best of your knowledge doesn't that rule require that a certain relationship or ratio be maintained between the aggregate indebtedness of a brokerage firm and its net capital?

A The aggregate indebtedness as defined by the rule, net capital as defined by the rule.

Q Now, at this time was that ratio the required ratio which was not to be exceeded 2,000 per cent?

A At that time it was.

Q Did it continue to be 2,000 per cent for approximately a year thereafter?

A I don't recall exactly when the ratio was reduced.

Q Well, certainly up to the time of the merger.

A I believe so.

Q Which was June of 1970.

A Yes, sir.

MR. BROOKS: Your Honor, I think Mr. Camhy is incorrectly characterizing the fact that I think we are in agreement with, the merger was on July 2nd.

MR. CAMHY: July 2, 1970, excuse me.

Q Now, can you tell us what the accounting implications are of a failure to be in ratio?

MR. BROOKS: I object to the question.

MR. HYDE: I join in the objection.

THE COURT: I don't understand the question.

MR. CAMHY: Your Honor, may I instead put the question in a different way?

Q Were you aware then and are you aware now that if a firm is out of ratio the exchange has the right to take certain action with respect to the firm by reason of its being out of ratio?

MR. HYDE: Your Honor, I object to the question. Is Mr. Lill being interrogated as an expert on the interpretation of the rules of the New York Stock Exchange? I don't think that this is his function. He is being called as an adverse witness as to facts.

MR. CAMHY: Your Honor, I am trying to establish from Mr. Lill what the financial implications to a firm are of being out of ratio. Why the computation is made.

THE COURT: Well, I don't understand that. What difference does it make?

MR. CAMHY: I want to establish that Mr. Lill knew that if a firm was out of ratio the exchange has a right to suspend, to demand more capital to require more securities be sold.

THE COURT: Are you claiming that these figures were distorted with that rule in mind?

MR. CAMHY: I am claiming that this computation was extremely material and that he should have known, and he did know its materiality. And I don't think the witness will dispute that.

MR. HYDE: Your Honor, the rules of the stock exchange speak for themselves. Certainly as to these matters.

MR. CAMHY: Well, they don't necessarily--

THE COURT: All right, gentlemen, to me you are raising a tempest about something that doesn't appear to me to be of too much importance in any event. Yes, you may answer the question.

A Rule 325 was a --

THE COURT: No, we don't have to have that. The point was, I think the question was did you know, were you aware of the existence of Rule 325 and your statement that you prepared was material in that respect. Did you?

THE WITNESS: Yes.

MR. CAMHY: May I follow with two or three questions along that line, your Honor?

Q Were you aware that a firm out of ratio could be called upon to put in more capital or in the alternative be directed to sell securities for the purpose of providing liquidity?

THE COURT: What difference does it make? I mean the point is --

MR. BROOKS: I object, your Honor.

THE COURT: -- that these figures in his computation were material in regard to the well being of the firm. He was aware of that.

MR. CAMHY: Yes.

THE COURT: So all right, the answer is yes.

MR. CAMHY: Your Honor, without pressing too hard I submit that they had more than a legal connotation. They had a financial connotation and that's the point I am trying to bring out. It wasn't merely a question of

suspension or being in compliance or out of compliance. There also was a financial impact to this and that is financial demands are made to raise capital or liquidate securities all of which has a financial impact on the firm because once they start liquidating they get into financial trouble and this does erode their value. And I was trying to elicit this from the --

THE COURT: The problem I have, Mr. Camhy, is that isn't that self-evident?

MR. CAMHY: Well, maybe it is, your Honor. But I thought --

THE COURT: I mean in terms of the rules of the exchange? If certain ratio doesn't exist they have to meet it and they have to take various steps, isn't that self-evident?

MR. CAMHY: Your Honor, if you say it is self-evident I assume it is self-evident. Shall I go on?

Q Mr. Lill, were you aware at this time that the exchange had set the ratio of 1,500 as a danger sign in which they kept a careful monitoring on member firms?

MR. BROOKS: I object to the question.

THE COURT: Objection overruled.

A I was aware that it was a monitoring device, certainly that as a firm got close to the 2,000 per cent the

closer it got the more concern would be expressed.

T3a Q Mr. Lill, are there profit and loss audits for member firms of the stock exchange? Were there at that time?

A No, there were not.

Q So then your audit function was a balance sheet status audit year to year on a status date, is that correct?

A Yes.

Q And the audit did not attempt to do a flow audit or a P and L expense audit?

A The audit was a balance sheet audit. It did not attempt to provide enough information so that we could render an opinion on the income statement.

MR. CAMHY: Your Honor, may I respectfully call the court's attention in Exhibit 109 to the ratio as shown on the second page, and to two letters, one memorandum dated December 5th, and a letter dated December 5th, appended at the end, indicating that certain deficiencies of capital were subsequently added to the firm after the audit date.

THE COURT: All right.

Q Mr. Lill, would you look at Exhibit 112. Is this a letter which was issued by Haskins & Sells shortly after November 26, 1969, in connection with its audit commenting on certain material inadequacies in the accounting system?

A Yes, sir.

MR. CAMHY: I offer it in evidence.

MR. HYDE: No objection..

MR. BROOKS: No objection.

xx (Plaintiff's Exhibit 112 received in evidence.)

Q Mr. Lill, I am going to ask you to help me put in the record a usable definition of certain terms. Could you tell us, please, what the term "failed to receive" means in stock exchange parlance.

A A "fail to receive" is a security which was not received by the settlement date by the broker on the buy side.

Q Would you tell us what a "fail to deliver" is?

A That is a security that has not been delivered by the settlement date by the broker on the sell side.

Q So then if a member firm has failed to receive these are securities they should have received from other brokers but haven't received by a specified date?

A By the settlement date, that's right.

Q Does your audit include a count of securities?

A Yes, sir.

Q Could you tell us about securities, so-called securities count differences, long differences and short differences?

A The security count is made to a stock record which shows the accountability for the shares of stock that are said to be in each physical location. We count the securities in each physical location and agree it to the amount shown on the stock record. If the account is greater than the amount shown on the stock record it is referred to as a long difference. If the count is less than the amount shown on the stock record we refer to that as a short difference.

Q Going to the question of the stock record, does that record show what the firm's records indicate should be owned by the various customers or proprietary accounts or other positions in the firm?

A The stock record is a balanced record that shows on one side the ownership of the securities. That is referred to on the long side. And it shows on the other side the physical location of the securities, and that is referred to as the short side. A stock record should be in balance for each security.

Q When you measure the actual count against the stock record, and you find that you happen to have physically more shares or evidence of physical shares than are indicated for that particular stock, say AT&T or General Motors-- if you have more shares than your stock record indicate are

in various positions ownership accounts in the firm, do you say you have a long difference?

A Yes, sir.

THE COURT: He just told us that, Mr. Camhy. He just told us what that means. Do we have to have that in the record twice? He has explained it.

MR. CAMHY: Very well, your Honor.

I guess, your Honor, my problem is that when I hear it it sounds much more opaque than as I envision it.

THE COURT: I thought he explained it very well.

MR. CAMHY: May I proceed with one more question, please, your Honor, and I will try not to hammer too much at any of these.

Q If your record indicates you should have more of a particular issue than you find on your count do you find that a short difference?

A If we count less than the amount shown on the record?

Q Yes.

A It is a short difference.

Q Is it possible that all of your long differences -- that is, securities -- do not relate to your short differences? That is to say, is there any necessary relationship between securities differences long and securities differences short? Could they be different securities, different accounts,

representing different problems?

A Yes, sir.

MR. HYDE: I object to the form of the question. I find it hard to understand.

MR. CAMHY: The witness understood it.

MR. HYDE: If the witness understands, I withdraw the objection.

THE COURT: I think I understand, too.

MR. HYDE: I'm sorry.

Q So then it is possible to have a mass of securities long differences which conceivably might belong to certain people who don't even know, or might belong to yourseof, if you are the brokerage firm, and it is also possible at the same time to have a group of short differences wher people are entitled to securities which you physically don't have and which you may have to go out and get?

MR. HYDE: Your Honor, are we talking about the same stock or different stocks? That is one of the problems I have with the question.

THE COURT: I gather we are talking about the brokerage houses inventory of what stocks it has; what obligations it has, and so forth. We are not talking about the same stock, I gather.

MR. HYDE: Mr. Camhy's question, the difficulty

I have with it, is I don't know if he is referring to a single security such as AT&T or the aggregate of all the securities held by the firm.

THE COURT: I assumed that he was talking about the aggregate securities held by the firm.

MR. CAMHY: That's correct, your Honor.

THE COURT: If it means something else you better tell me.

MR. CAMHY: No, I am talking about what your Honor said.

A Now I am confused. It is possible to have a short difference in General Motors and a long difference in American Telephone that do not relate to each other.

Q Could you have a short difference in General Motors and a long difference in General Motors after a count in an audit?

A Not in the same position.

Q No, I didn't think so. So that if you had differences you would have securities which at least initially, prima facie, don't seem to relate to each other? That is your long differences would be a set of securities which you tried to match to each other and can't?

A That is possible. There are relationships. You may have a short difference in General Motors and a long

difference in General Electric which ultimately are determined to relate to each other.

Q Yes, I understand that.

A By the same token you may have long and short differences that are ultimately determined not to relate to each other.

Q But prima facie -- that is, starting with the difference which you have not been able to research to an identifiable mistake -- there is no apparent relation between your General Motors over and your General Electric under? They don't offset each other in any way?

A Prior to research, no.

Q Is it the purpose of research to try to identify the source of the difference?

A Yes, sir.

Q Is it the purpose of research to try to find the event or transaction which caused the error to occur and thereby adjust the error?

A Yes.

Q Mr. Lill, what is meant by the phrase used in many of these documents called "unsecured customer's accounts"?

A An unsecured customer account is an account which has a debit balance for money or a short position indicating that the account owes either money or stock,

and there is no equity in the account.

Q It is really a situation where your customer owes you money and you don't have enough security to get it from him unless he wants to pay it to you?

A The customer either owes you money or stock, and it is not collateralized.

Q There is a term used in the questionnaire which is "dividends on fails to receive". Could you tell us what that is?

A The item you are referring to is item 4D.3.

Q That's correct.

A That amount represents dividends declared on securities which were in fail to receive during the period between the record date and the payable date.

Q That is $8.138 million?

A Yes.

Q That is on the dividend date or the dividend payable date the security was not in house -- that is, it had not come in from the sell side of the trade and at the time the dividend paid you didn't have the security and didn't get the dividend?

A We did not have the security, or I should say the firm did not have the security in its name so the dividend would have been paid to someone other than the firm.

and the firm in turn would have had to claim it from that other party.

Q Turning to question 13, down at the bottom of the questionnaire which is Exhibit 26, there is an item "dividend differences" right under "security count differences."

What is meant by the term dividend differences?

A They were dividends that were declared on securities in which there were differences on the record date.

Q Were these necessarily cash dividends or stock dividends or could they have been either?

A The particular item shown in the security valuation columns were stock dividends.

Q Did that just happen to be in this case or would it be in almost every case?

MR. BROOKS: I object to the form of the question.

THE COURT: Objection sustained.

Q In computing the net capital of the firm was a charge made for security count differences in your computation, Mr. Lill?

A In the computation that is Exhibit109, there is no charge for security differences. The note on the bottom of page 1 clearly indicates no charge was included for

security differences.

Q Did your firm have a consistent practice about whether to charge or not to charge for security count differences?

A Security count differences during this particular period of time were not specifically provided for in Rule 325, so we did not have any fixed practice. We tried to establish which interpretation was being used at the time.

Q Who did you understand would ultimately fix the rule in a particular case as to whether a charge ought to be made for security count differences?

A Well, the New York Stock Exchange, with its Rule 325, or the Securities and Exchange Commission, which has a similar Rule 15C3-1.

Q Did you understand that the exchange would have the right to impose a charge in a particular case under the rule after reviewing the questionnaire?

A Yes, I understood that the stock exchange rules were subject to the stock exchange's interpretation.

Q Do you know whether other firms made it a routine practice to charge themselves with securities count differences in computing their capital?

A During this period of time I am not sure that there was any routine treatment for differences.

Q For example, Hirsch & Company?

A I am not familiar with the specifics of Hirsch & Company.

Q Do you know, on the other hand as a routine practice, whether any other firms charged themselves for differences duringthis period?

A Yes, sir, some firms did charge themselves for differences.

Q Wouldyou consider that a more conservative accounting practice?

MR. BROOKS: I object to the form of the question. It doesn't have anything to do with an accounting practice.

THE COURT: I think that's right.

MR. CAMHY: Sustained?

THE COURT: Yes.

Q Would you consider it a more conservative expression of net capital to charge yourself with security differences?

A Certainly the more changes you apply the more conservative your treatment.

Q In dealing with securities differences have you ever heard the term used that they are volatile?

A I have heard the expression used, yes.

Q Does that mean that a difference in one situation can lead you to a difference of another kind of or different security?

A Yes. It means that differences are continuously charged in the course of business, particularly during this period of time when there was the so-called paperwork crunch on Wall Street. A security count difference may take three or four different elements before it's totally resolved.

Q In resolving differences, is it possible that you could start with a long and end up with a short?

A Yes, sir, it's possible.

Q And you could sometimes start with a short

and end up with a long?

A Yes, sir.

Q Is it possible thatyou could start out with a difference in one security and end up with a difference in another security?

A Yes. I suppose. You could start out with a difference in General Motors and in researching it find out that maybe that difference should be General Electric, or something, depending on how the research progressed.

Q In the duPont audit, approximately how many items of differences were, just in some degree of magnitude?

A In round numbers there were thousands.

Q Thousands?

A Yes.

Q Possibly tens of thousands? In excess of 10,000?

A Yes, I believe there was.

Q Difference items, individual difference items?

A Individual differences.

Q In researching the differences is the object to trace the difference to an identifiable event that caused it, the misdelivery, etc.? Once you found that,

haven't you in fact solved the difference?

A Yes. When you find the cause you know what caused it.

Q Doesn't a lot of it mean getting to the date -- that is, here you have a security on hand, and didn't you or somebody once say if you could get to the date when the mistake was made you have got three quarters of the problem solved?

A Yes. The meaning of the expression, incidentally, is if you know the date the error was made you then have a more limited area in which you have to research.

Q Isn't it true that in researchingthese there aremany, many items which you can never find the date on?

A There are a lot ofitems like that.

MR. BROOKS: I object tothe question if it's asked as a general proposition.

THE COURT: I am going to sustain that objection. I would think we are now at the point where we ought to deal with specifics.

Q At the time you performed your audit and you had these differences I presume the fact that you called them differences means that they had not

been resolved through research as at the audit date?

A The items reported in the answers to financial questionnaire were those that had not been resolved by the date of our opinion.

Q Which " have been November 26?

A Yes, sir.

Q So that if you had been able to resolve any between September 28 and November 26 they wouldn't have been reported in your audit as differences?

A That's right. The appropriate adjustment would have been made prior to our rendering an opinion on that financial statement.

Q Your audit started sometime before September 28, didn't it?

A The audit was as of -- as at September 28, but the process of audit didn't start sooner than September 28. Possibly a day or two.

Q But no more than that?

A No more than that.

Q Did you have Haskins & Sells personnel working on these differences during the audit period?

A During the audit period duPont had a group that was referred to as the differences group. They were devoting their term to researching the differences.

They would find the ultimate resolutions and then pass the resolution to one of the Haskins & Sells accountants.

Our accountants would evaluate the accuracy and appropriateness of that resolution. If we agreed that the resolution was a proper one we then made the appropriate adjustment in the financial statements.

Q Mr. Lill, would you look at Exhibit 218? Is this a material inadequacies letter which you issued for the previous year, 1968, commenting on accounting conditions at duPont?

A Yes. This is what's referred to as the material inadequacies letter.

MR. CAMHY: I offer it in evidence.

MR. BROOKS: I object on the grounds of relevancy. The year is September 30, 1968 and I understand the plaintiffs made an investment in July of 1970. I think it's irrelevant tothe condition of the duPont firm in July of 1970, and I object on that ground.

MR. CAMHY: Your Honor, this relates to what the defendants should have disclosed. Among the things we claim they should have disclosed was there were two years of material inadequacies letters as a background, that for two years the auditors had reported material inadequacies, the 1968 and 1969.

THE COURT: The objection is overruled.

(Plaintiff's Exhibit 218 was received in evidence)

Q In doing your audit for 1969, year ended September 28, 1969, was it part of your audit function to inquire of the firm what --

MR. HYDE: I object to the form of the question. I think Mr. Camhy misspoke himself. He is speaking of an audit for the year ending September 28. There was no audit for the year ending. There was anaudit as of a particular date, not for a year ending.

MR. CAMHY: Excuse me,your Honor.

Q In connection with your audit as at September 28, 1969, was it part of your audit procedure to inquire of the firm what comments it received from the exchange as to its accounting practices or its compliance with ratio, and to request copies of any communications from the exchange which the firm had received?

THE COURT: Would you read that back, please?

(Question read)

A Our practice was to request any reports rendered by the New York Stock Exchange examiners on any

examinations performed during the period between audits.

Q Did they turn over to you those reports, and specifically Exhibit 135, premarked --

MR. CAMBY: I am sorry, may I read off a list of numbers, please.

Exhibits 137, 135, 226. I regret these delays, but we didpremark these exhibits.

THE COURT: That's all right.

Q Mr. Lill, would you look at Exhibit 137, please. Did you have access to that letter at thetime you did your audit?

A I probably did. I don't remember specifically, but I believe I would have.

Q And that letter refers to a report prepared by the examiners of the exchange as being enclosed with the letter.

Was that report, which is Exhibit 135, made available to you?

A I believe it was.

MR. CAMHY: Your Honor, on that basis I would like to offer these two.

MR. BROOKS: I don't have an objection to 135, your Honor, but I don't think there is a foundation for 137 coming in. I don't think Mr. Lill has said he saw that at the time.

THE COURT: I understood him to say that he thought he had.

MR. CAMHY: Yes.

MR. BROOKS: I thought he said he didn't know.

THE COURT: I didn't hear that.

MR. HYDE: I thought, your Honor, he said that he didn't remember having seen it but he assumed that he had. Whatever that --

THE COURT: What did you say, Mr. Lill?

MR. LILL: You can read it back but I said I believe that it would have been available to me I don't remember specifically receiving it.

THE COURT: All right. On that basis the objection is overruled. Plaintiffs' Exhibits 135 and 137 are both received.

(Plaintiffs' Exhibits 135 and 137 were received in evidence)

BY MR. CAMHY:

Q Turning to Plaintiffs' Exhibit 137, Mr. Lill, can you recall being made aware during your audit that the exchange had found a ratio based on unaudited figures as at June 30, 1969 of 22.93 per cent? Or in that area?

A I don't recall any --

MR. BROOKS: Your Honor, there is no point in that figure.

MR. CAMHY: Excuse me, 2000 --

Q Do you recall being made aware during your audit that the exchange had found them in the 2000 area ratio as at June 30, '69?

A I don't recall specifically.

Q Do you remember discussing with anybody that they had had ratio problems with the exchange the previous summer?

A I remember discussing ratio problems. There were continuous ratio problems during this period of time.

Q Including the months which preceded your audit?

A Yes.

Q Turning to page 3 of the letter, which is Exhibit 137, do you recall a problem of bulk segregation

in this firm? Inadequate segregation and lack of control in connection with segregation which is shown on page 3?

A I recall the firm had segregation problems. The specifics of the dates of that I am not certain of, but --

Q Could you tell his Honor what a segregation problem is?

A Well, the firm has to follow a stock exchange segregation which indicates that any securities that aer fully paid for, or excess margin should be segregated.

Q That is these securities would be in street name not the customer's name but they were fully paid for and the firm would have to keep them separate and apart, is that correct?

A The firm would have to maintain the securities either through record keeping or physical certification in a qualified segregation area. The securities, Mr. Camhy, are not necessarily in street name, they are in negotiable form.

Q All right. But they are not in the customer's name, that's the important thing.

A Generally not.

Q Turning to Exhibit 135, Mr. Lill, on page 8 do you recall -- at the bottom of page 8 -- that in the months prior to the audit there had been considerable discussion and problem about unsecured and inadequately secured accounts? And capital charges made because of those?

A I recall there were problems discussed, yes.

Q Do you recall -- turning to page 9 -- again, do you remember a problem of failure to deliver out securities resulting in these unsecured accounts? Page 9, middle.

A I don't follow your question, Mr. Camhy.

Q Well, there seems to be a suggestion there that a good deal of the problem about unsecured accounts arose from the fact that the firm was not delivering securities to customers resulting in the fact that the account would show a customer liability and the customer being unwilling to pay it simply because he never got his stock.

MR. BROOKS: Your Honor, I am going to object to this line of questioning.

Q I am going to suggest that to you, Mr. Lill, as my suggestion. You can either accept it or reject it.

MR. BROOKS: I am still going to object, your Honor, because the document speaks for itself. What it says, it says. The question to Mr. Lill as to whether he was aware of it or not I think is irrelevant.

MR. CAMHY: I am asking him whether looking at this his recollection is refreshed on that question or apart from this his recollection is refreshed on that.

THE COURT: Well, I gather that what the purport of the question is as far as I can understand them is Mr. Lill is being asked whether some of these problems that were presented in this report and letter were brought to his attention and whether he was aware of them during the time that he was doing the audit. It seems to me that those are legitimate questions if I understand them correctly.

MR. BROOKS: I didn't understand that that's what Mr. Camhy was attempting to do.

THE COURT: Well, is that what you were trying to --

MR. CAMHY: That's what I am trying to do, your Honor.

THE COURT: All right.

A Would you please ask the question again?

Q First, Mr. Lill, wholly apart from this document were you aware that some ofthe problems in connection with unsecured and partially -- and inadequately secured customer accounts arose from the fact that securities purchased by customers were not delivered and that the balances were not being paid by the customers because they didn't want to pay for something they didn't get?

A No, that is I believe going the wrong way. The securities in an unsecured account were delivered to customers, but the firm had not received the cash and that is what made it an unsecured account..

Q You are talking ab ut Lill --

MR. CAMHY: Your Honor, may I , this is an adverse witness.

T5b

Q You are talking, Mr. Lill, of a classic unsecured account. That is somebody who doesn't want to pay for something he got or some customer who got ahead of you. I am suggesting to you that in some of duPont's situations their accounts showed balance due from customers which customers were not paying for and which they were not holding enough to cover but which balances really didn't reflect balances because the customers claimed they never got the stock. Now does any of that ring a bell with you?

A It may be so. I don't remember specific discussions of that problem.

THE COURT: Well, Mr. Lill, I think that in all fairness to you it seems to me that what he is asking you is whether you were aware of this. If you are not, you are not. Whether you were aware of any of the things he has raised. And if you weren't aware of it at the time I think that the answer is no. The point is did this come to your attention? If it came to your attention the answer is yes, and if it didn't, it didn't.

A It did not.

THE COURT: All right. We will take a ten-minute recess.

(Recess.)

THE COURT: All right, Mr. Cumhy. I am sorry for

these delays and disruptions but I trust that they won't last beyond today.

BY MR. CAMHY:

Q Mr. Lill, would you look at page 9 of Exhibit 135? Down toward the middle of the page it says, "It was apparent" etc., would you look at that paragraph and tell me if it refreshes your recolllection as to any particular problem at duPont which you were aware of then.

A That does not refresh my memory.

Q Turn to page 10. And the first paragraph of text under the figures on page 10. The reference to 6,000 so-called no name customer statements. Does that refresh your recollection as to any problem at duPont with which you were aware at the time you did your audit?

A Yes, we were aware of the no name problem when we did our audit.

Q Would you consider that a significant problem?

MR. BROOKS: I object to the form of the question, your Honor.

THE COURT: The objection is sustained. I don't think it makes any difference whether he consider it significan or not.

Q Did you consider it a material inadequacy in the company's records?

A I don't believe we considered this a material inadequacy for reporting purposes, but I would have to refer to the inadequacy letter.

Q Well, apart from your letter, sitting here do you regard this as a material inadequacy?

A No. We do not regard this as an item that we would consider a material inadequacy as we use the term.

Q Turning to page 11 the paragraph that begins "Review of dividend records."

MR. CAMHY: May I read aloud, your Honor?

THE COURT: Yes.

MR. CAMHY: Or would your Honor prefer to read to himself?

THE COURT: I have read it.

MR. CAMHY: Excuse me, your Honor.

Q Having read that paragraph does this suggest to you the existence of a material inadequacy in the company's records?

MR. BROOKS: Your Honor, I am going to object. Mr. Lill did his audit as of September 28th. This is a report as of June 30, 1969. I think that it is unfair to suggest that the same problems existed at the time Mr. Lill was making his reports unless that it is established from asking Mr. Lill.

THE COURT: I think that's right, Mr. Brooks, and I had thought that the way the question -- this is the only question that I recall that's been framed in that manner, I think that all the other questions were whether Mr. Lill was aware of that particular problem at the time that was referred to, and I think you ought to reframe the question.

Q Mr. Lill, were you aware of this problem at the time you did your audit?

A Yes, sir.

Q Do you regard that this discloses an inadequacy, a material inadequacy in the company's records?

A Yes, it did and we reported it as such.

THE COURT: I didn't hear the last.

THE WITNESS: Yes.

THE COURT: It was reported--

THE WITNESS: It was reported as such.

THE COURT: That was the matter that was referred to in what is it--

THE WITNESS: Exhibit 112, page 3.

THE COURT: I see. I thought it was referred to--

THE WITNESS: Your Honor, the amounts are referred to in Exhibit but the definition as a material inadequacy becomes a part of the Exhibit 112.

THE COURT: I see. I had looked at Exhibit 126 and thought that it was referred to there. All right.

T6a

Q Turning to page 13, Mr. Lill--

THE COURT: Still on Exhibit 136?

MR. CAMHY: Yes, your Honor.

Q The paragraph that says "Review of the stock record also disclosed," etc.

Do you recall that the stock record disclosed numerous invalid positions?

A Yes, sir.

THE COURT: Let me be sure I understand. Are you through on that point?

MR. CAMHY: Yes, your Honor.

THE COURT: This particular point referred to, that becomes a problem, or does it become a problem for accounting purposes only if after research a period of time the matter cannot be reconciled? Is that where that problem is?

THE WITNESS: Yes, that's right. If that problem is not researched and resolved it then continues to be a difference, and it is a problem because it is a difference at the time of reporting.

THE COURT: Am I correct this kind of problem would occur in the examination of most houses?

THE WITNESS: Most major houses would have it.

THE COURT: I am trying to see if this kind of discrepancy is not unusual.

THE WITNESS: No, your Honor.

Q In the 1968 audit had you discovered substantial long and short differences?

A Yes, sir.

Q In connection with the long differences was the magnitude of those differences approximately the same in 1969 as it was in 1968?

A I would have to refer to the 1968 report to answer that accurately.

Q If you look at the material inadequacies letter for 1968 there is a reference to some of the differences in there.

THE COURT: What exhibit number is that?

MR. CAMHY: That would be Exhibit 218.

A Yes, it appears that the long differences as of June 30, 1968, were approximately the same as they were as of September 28, 1969.

Q And there were also approximately five million three in short differences as of 1968?

A Yes.

Q And the number in 1969 was six million nine,

if I read the exhibit correctly?

A Yes, six million 950, plus the dividends of one million 809.

Q Is there any way of knowing whether these are the same differences?

A You can only assume that. You have no precise way to know that the same difference was present in 1969 as in 1968, because it is not unusual, for example, for a hundred-share difference in American Telephone in 1968 to have been cleared up and then have another difference in 1969 similar in amount.

Q Can you assume that any portion of them remain unresolved differences left over from the previous year?

MR. BROOKS: I object. You can assume anything.

Q As a professional, can you make any professional judgment?

MR. BROOKS: I object to that question.

THE COURT: I will sustain the objection.

MR. CAMHY: Can I ask it in one other form?

THE COURT: Yes.

Q As a professional did you make any professional judgment about these?

A I don't recall having made a judgment.

Q Do you recall expressing a judgment about them

on examination before trial?

A I don't recall. I may have.

MR. CAMHY: Your Honor, the question was asked on examination before trial in the abstract, not as a historical fact. If your Honor rules it objectionable here it was objectionable then, too, but I would point out he did make some expression on the subject on deposition, and the question is may I put that to him?

MR. HYDE: It was posed in the abstract in deposition. Here we have a precise question asking the witness to compare.

THE COURT: Why don't you let me see what was asked.

MR. CAMHY: I will get to that later. It would delay things too much for me to try to drag it out now.

THE COURT: All right.

Q Can you tell the court what you recall about the manner in which the six million dollar capital deficiency shown on your capital computation, how that was made good reported in your letters attached to the capital computation?

A The capital computation on Exhibit 109?

Q I believe so, yes, Mr. Lill.

A The two letters attached to that exhibit were

added to provide the information as to how that was corrected. There was new capital by the transfer of the Wall Street leasing stock, which in effect made a non-allowable asset an allowable asset, and in the second letter it indicates that an additional six million 868 of cash and securities were brought in as additional capital between the examination date and the date of our opinion.

Q What I am focusing on is when approximately in respect of the date of your opinion the capital was brought in.

A Our letter that is attached to that exhibit is dated December 5, 1969. The only thing I can tell from the letter is that it was brought in between September 28, 1969, and November 26, 1969. Some time during that October-November period.

Q Mr. Lill, looking at the number 6,868,000 and comparing it to the number of capital deficiency on page 1, 6,827,000, I suggest to you that the deficiency was known before the additional money was put in. That is to say, that this contribution was calculated to meet the need of this deficiency.

A I am not sure of that. The deficiency, I believe, was probably known. I don't know that the amount was brought -- the amount was brought in was actually calculated

for that, because there is an additional one million dollars provided on a prior letter.

Q But that is prospective, is it not? That is capital to be added by December 10th?

A That's right. That is within the week after the report.

Q What I am suggesting to you is that the capital which met the needs of your opinion was the capital on the second page of 6,868,000, which seems to conform pretty closely to the number of the capital deficiencies shown in your computation.

A It approximates the number, but as I recall there was a real effort to get additional capital in, and I believe they were shooting for a higher number. I just believe that by this date, by December 5th, that was as far as they could get.

Q My question is, at the time they went out looking for this capital did they have a number that they had to shoot at computed by you in rough, or giving them an estimate of what they would need?

A I am just not sure of the sequence or when they actually went out. During this period of time they were trying to get additional capital. They were under a directive to get more capital during this period of time.

I just don't know whether they had this number before they actually went out for the capital. I would believe they were out for more capital before they had the number

Q That's right. But --

MR. CAMHY: Your Honor, I withdraw that.

Q Do you know from whom the capital came forming the two million 106?

A It came from various people within the duPont group.

Q Was that Wilmington money? Was that the duPont Laired group?

A I don't recall. I don't believe it was. I believe this was funds in addition to any duPont Laird money. I believe this was additional funds obtained from other capital contributors.

Q Turning to Exhibit 226.

A Do I have that?

Q It is a memorandum dated December 16, 1969.

A I don't believe I have that.

(Pause)

A I have it now.

Q Mr. Lill, did you write this memorandum?

A Yes, sir.

Q It deals with a meeting at the New York Stock

Exchange, is that correct?

A Yes, sir.

Q Having to do with duPont's capital and the computation of capital?

A Having to do with a computation of capital and the long term report that was filed.

Q Your audit was in by this time, is that right?

A Yes, sir.

MR. CAMHY: I offer this memorandum into evidence.

MR. HYDE: No objection.

MR. BROOKS: No objection.

xx (Plaintiffs' Exhibit 226 received in evidence.)

MR. CAMHY: Your Honor, I have noticed that the clerk has been marking the exhibits being looked at by the witness, and I wonder whether at some appropriate time we couldn't get your Honor's copies marked in as the court official exhibits. They are better copies for the most part. I don't want to interrupt the trial now, but my request is that your Honor's copies be marked, because for the most part the good Xeroxes went to the bench.

THE COURT: You may certainly mark mine.

Q Was it your practice to attend meetings at the exchange or with the SEC relative to the compliance by

one of your clients to regulatory procedures?

A We attended meetings whenever requested to do so, and on some clients we were requested.

Q Did duPont request you?

A I believe this meeting both duPont and the New York Stock Exchange requested our presence.

Q Had you been aware that there were meetings immediately prior to this meeting at which you were not in attendance, meetings related to the raising of capital?

A Yes, I was aware there were meetings taking place.

Q Had you been told by anybody at duPont that they had been asked to raise new capital, and that for the time being at least these exhausted their ability to do so?

A I was certainly aware they were under directive to raise new capital. I don't know that anyone at duPont actually told me they were trying to raise new capital and they were unable to do so.

Q Did you know this six million was at least for the short term the extent of their ability on a short term, one or two or three-week basis?

A I did not know that.

Q Looking at the exhibit, it is true, is it not,

very day of the meeting, was it not? It bears the same date. Excuse me, I am talking about Exhibit 226.

A Yes, it was.

Q Do you recall whether the meeting was in the morning or the afternoon?

A I don't recall.

Q Do you recall going back to your office and writing a memorandum?

A Yes, I do.

Q Am I not correct that you sent a copy of it to Mr. Speicher at duPont?

A Yes, I believe I did.

Q Could you tell the Court who Mr. Speicher is?

A Mr. Speicher was the financial officer of the firm during this period of time.

Q And he was the person directly responsible for capital compliance there, wasn't he?

A I am not sure that he was directly responsible. Capital compliance is a combination of financial and operations. Mr. Speicher was involved with financial, and Mr. Gay was involved with operations.

Q Now, Mr. Gay was at the meeting, was he not?

A Yes.

that the exchange applied a capital charge to the computation for the item of eight million 138,344, representing dividends on securities fail to receive? And I suggest you turn to page 3 of the memorandum, the center of the page. Where it says "The exchange then applied the reductions in capital."

A Yes. As the memo indicates the exchanged indicated they were going to charge.

Q In addition to that, do you recall that the exchange made a charge for the dividend differences of approximately one million eight, which was shown on the long form questionnaire?

A That particular item I am not familiar with. Is that indicated in my memo, to refresh my memory?

Q I am going to show you a letter which might help refresh your recollection.

Your Honor, may I just hand this up to the witness to refresh his recollection. It's exhibit 151 (handing to witness).

Q Do you recall that this item of one million eight was a charge, and then you ultimately reclassified it so that it wouldn't have to be a charge?

A I think the purpose this meeting, as I recall, was to discuss these three items.

Q Tha's right.

A To determine whether or not they should be a charge?

Q That's correct.

A And when I explained this item as being the same as a difference they then suggested, well, if it's a difference call it a difference, and at the time

there was no fixed rule as to whether or not differences would be charged.

Q Thank you.

MR. HYDE: For the sake of clarity, may I ask the witness to identify who the "they" is that he referred to in his answer.

THE WITNESS: The "they" were the stock exchange representatives at the December 16, 1969 meeting.

MR. CAMHY: Mr. Hyde, just so we can have it in, since the witness has looked at it, I offer Exhibit 151, a letter written by Haskins & Sells of January 13, 1970.

MR. HYDE: No objection.

MR. BROOKS: The letter bears some handwriting which I do not believe is Mr. Lill's. I have no objection to the letter without the handwriting, but I think if the handwriting is being offered that should be connected.

MR. CAMHY: I propose to do that. For the time being I will take the exhibit without the handwriting.

THE COURT: All right.

(Plaintiffs' Exhibit 151 was received in evidence)

Q This memorandum was prepared by you on the

Q There were others at the meeting, one of which was Mr. Paul Chenet of the exchange?

A Yes.

Q And he was an examiner of the exchange?

MR. CAMHY: Mr. Brooks, was he the chief examiner principal examiner, do you recall his title?

MR. BROOKS: I don't believe I am a witness, but I would deny he is an examiner. Let Mr. Camhy prove what he was in any way he wishes.

Q Do you recall what Mr. Chenet's title was?

A I don't recall what his title was at this time.

Q Was he in charge of this matter at the exchange?

A He participated in the meeting as a representative of the exchange. I don't know whether he was in charge or what.

Q How about Mr. Bishop?

A Mr. Bishop joined the meeting after the preliminary discussions had been completed.

Q Is it not true that you were informed at this meeting that there would be an additional $8,100,000 in capital charges?

A Yes, the exchange indicated that they were

going to make charges for these items.

Q And this very substantially increased the capital deficiencies computed on your computation?

A If all other things stayed the same. I don't know what may have happened on the positive side during this period of time.

Q Is there anything in here on the positive side?

A I don't know. This meeting took place on December 16, and I am frankly not sure whether or not any additional capital was brought in between the November 26 letter and December 16.

Q Taking the November 26 letter, and this, by itself, I am correct that there would be an additional eight million one in capital charges unless some other capitalwas brought in, isn't that right?

A There would be an additional charge of eight million one.

Q That raised your capital deficiency from six million eight to 15, 16, 17 million area, unless some other item was adjusted?

A Yes, unless aggregate indebtedness was reduced, additinal capital was brought in or other capital charges had been reduced.

Q Do you know any of those things happened?

A I believe there were reductions in some of the capital charges. I believe there were unsecured accounts and other areas Mr. Gay reported certain items that had progressed, but I don't know how to quantify them or that they ever were quantified.

Q Turning to page 2 of Exhibit 226, do you recall that -- well, it says there "The previous discussion were summarized for Mr. Bishop and he expressed concern that Francis I. duPont was still not meeting the Rule 325 capital requirements by a significant amount and inquired as to how this situation should be remedied."

A Yes.

MR. BROOKS: Your Honor, that is a misstatement. The memo reads: "Was to be remedied."

MR. CAMHY: Isn't that what I said?

MR. BROOKS: You said "should be."

MR. CAMHY: Excuse me. "Was to be."

THE COURT: Thank you, gentlemen. I have the matter before me.

Q Then you notice there was some discussion about the availability of additional capital?

A Yes, there is reference --

Q Some 20 million was promised but one million

was really there, isn't that right?

A There was a standby arrangement for $20 million, yes.

Q But that was --

A One million had been brought in.

Q That was possible but not committed, isn't that correct?

A That's right.

Q Did you send a copy of this memorandum to anybody else?

A I don't recall sending it to anyone. I certainly would have made it available to anyone present that requested it. My purpose of sending it to Mr. Speicher was to inquire whether this was an accurate presentation of what took place.

MR. CAMHY: Your Honor, may I direct the Court's attention to the last paragraph on page 3 and the two paragraphs on page 4.

MR. CAMHY: Your Honor, may we confer for a moment at the bench?

THE COURT: All right.

(At the side bar)

THE COURT: What can I do for you, Mr. Camhy?

MR. CAMHY: Your Honor, sitting in the back are Mr. Bishop, Mr. Chenet and others and what happened at this meeting is a matter of recollection. Maybe there is some differentiation among the witnesses and I would consider it a courtesy if those gentlemen weren't in attendance during the --

MR. BROOKS: Well, Mr.Bishop is a responsible officer of the stock exchange on this problem, litigation, Mr. Chenet is an employee of the stock exchange, Mr. Bolos is an employee of the stock exchange. If Mr. Camhy wants to insist on it I have no objection to excluding Chenet and Bolos --

MR. CAMHY: It's only Mr. Bishop that I want to exclude.

MR. BROOKS: Then I object.

MR. CAMHY: It's a question of what was said to whom and,you know, I would hope it doesn't make any difference but --

THE COURT: Well, you know, Mr. Brooks

is entieled to have an officer of the corporation, if he is representing the corporation I can't exclude him.

MR. CAMHY: He is going to be a witness on the same subject.

MR. BROOKS: Mr. Camhy has taken Mr. Bishop's deposition and he's inquired into this meeting. He has it pinned down as to what he is going to say.

THE COURT: Well, tha's besides the point. The point is he is an officer representing his corporation and I can't exclude him if you object. There is nothing I can do about that.

MR. CAMHY: Thank you, your Honor.

(In open court)

THE COURT: All right.

BY MR. CAMHY:

Q Mr. Lill, does it make any difference --

MR. CAMHY: Strike that.

Q Is there any distinction in the treatment of a difference between one which is liquidated and one which is not liquidated? That is, is capital helped in any way by the mere liquidation with a difference? Let's take along difference where you have securities on hand the ownership of which so far as the records,

the audit shows, isn't indicated. Does selling that security help capital in any way?

A Economically there is no help to capital.

Q Now --

A By capital now you are referring to rule 325 capital?

Q Either net worth in the capital sense or rule 325 capital. Just the mere selling of a security.

A No.

THE COURT: Mr. Camhy, I am going to suggest that when you get to a point that you can stop that we'll adjourn. I have a verdict and --

MR. CAMHY: This would be the point, your Honor. I would prefer not to launch into all of this. I do want to get into something else.

THE COURT: All right, then, in those circumstances we'll adjourn until tomorrow morning at 10 o'clock.

MR. CAMHY: Thank you,your Honor. Your Honor, may I have leave tomorrow morning to make a very short for the record renewal of my amendment motion? It will take no more than two minutes.

THE COURT: Well, I think your record is protected, Mr. Camhy. I have denied it. I have set

forth my reasons for it. I don't see any point in your --

MR. CAMHY: May I just say one sentence now?

THE COURT: You may say one sentence now.

MR. CAMHY: Your Honor, I think that it's Mr. Brooks' job here to demonstrate much more specifically than he has how there would be any prejudice to this amendment. I don't think that his statement in the conclusory fashion that they were offered demonstrate that there will be any prejudice.

THE COURT: But the point is that I have denied the motion on several grounds. I have no -- I may agree with you that some of the proof may be the same but I have given my reasons for the denial. I don't care whether they accord with Mr. Brooks' reasons for wanting to be denied that's what you have to deal with, not Mr. Brooks. And I have stated my reasons for denying it and I stand on that. That's all right, Mr. Brooks, it's my reasons for denial.

MR. BROOKS: I would like to call to Mr. Camhy's and the Court's attention that we submitted a 20-page memorandum where I think we were quite --

THE COURT: All right, I think you are

protected, Mr. Camhy and if I am in error you will have me corrected.

All right, we will adjourn until tomorrow morning at 10.

(Adjourned at 4:45 p.m., to June 18, 1975 at 10 a.m.)

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
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HOWARD C. HIRSCH, et al.

vs. 72 Civ. 775

HASKINS & SELLS, INC., et al.

June 18, 1975
10 a.m.

Trial resumed.

- - -

(In open court)

E D W A R D J. L I L L resumed.

DIRECT EXAMINATION CONTINUED

BY MR. CAMHY:

MR. CAMHY: May I, your Honor?

THE COURT: Yes.

MR. CAMHY: The last question yesterday was:

"Q Is there any distinction in the treatment of a difference between one which is liquidated and one which is not liquidated? That is, capital helped in any way by the mere liquidation of a difference?"

It says with a difference, I mean of a difference.

"Let's take a long difference where you have securities on hand the ownership of which so far as the records,or the audit shows, isn't indicated. Does selling that security help capital in any way?

"A Economically there is no help to capital.

"Q Now --

"A By capital now you are referring to rule 325 capital?

"Q Either net worth in the capital sense or rule 325 capital. Just the mere selling of a security.

"A No."

Q Now, if you identify the difference and establish that there is no claim against the security and you sell the capital -- you sell the security and put it into cash and credit net worth I gather capital is helped, is that correct?

A Capital is helped. If by identify you mean if you resolve the long difference and it no longer has the status of the difference, and it's sold you find the solution and you find the solution and you find that the stock does belong to the firm and it's sold then capital is helped, yes, sir.

Q Can you think ofany reason why it was suggested that liquidating the security would help capital?

MR. BROOKS: What is the question, your Honor? Suggested by whom? I don't think there is a foundation for that.

Q Did you get the impression at this meeting that liquidation of these differences would help capital?

A There was going to be, I got the impression at the meeting that there would be different treatment after liquidation than while they were still open, yes.

Q And didn't you testify on examination that you were at least to a degree --

MR. HYDE: May we have the page?

Q On page 118. Starting on page 116.

Your Honor, may I read?

THE COURT: Yes.

MR. CAMHY: Page 116.

"Q Did this question then of improving capital by disposition of long security differences come up?

"A It came up. But in a different format than the way" --

MR. CAMHY: Your Honor, if I may, could I have the witness look at this statement?

THE COURT: Yes.

THE WITNESS: Is this my pretrial deposition?

THE COURT: What are you reading from?

MR. CAMHY: Yes.

THE WITNESS: I do have a copy of that in my briefcase.

MR. CAMHY: I will let you have my copy (handing). Page 116.

MR. HYDE: How far are you asking him to read?

MR. CAMHY: Line 11 through page 117, line 20, and then page 118, line 15 through page 118, line 23.

MR. HYDE: Well, your Honor, is this intended to indicate some difference between the testimony that the witness just gave and his pretrial deposition?

MR. CAMHY: Not yet, your Honor.

MR. HYDE: Then what is the point --

MR. CAMHY: I am just trying to save some time, Mr. Hyde.

MR. HYDE: E reading in --

MR. CAMHY: By asking the witness what he was asked then and putting it in in a --

MR. BROOKS: I object to that, your Honor. I don't think that's the proper way to proceed in a trial.

THE COURT: All right. All right, Mr. Camhy,

the objection is sustained.

MR. CAMHY: All right, may I hear the last question and answer?

(Record read)

MR. CAMHY: Your Honor, if I may, it's my understanding that I would have the right to read these independently and Mr. Hyde would have the right to read any other portions that he wished. It's independent of calling the witness. These are admissions by a principal of a party that were made in proceedings and I could read them.

Now, I agree that ordinarily --

THE COURT: Mr. Lill is one of the principals of the accounting firm?

MR. CAMHY: Haskins & Sells.

THE COURT: All right.

MR. CAMHY: Thank you.

"Q And didthis question then of improving capital by disposition of long security differences come up?

"A It came up but in a different format than the way you have described it. It came up in a way that if it was decided that short differences should be charged against capital it did not seem realistic to give credit to some part of the long" --

"Q Not to give.

"A -- not to give credit to some part of the long differences. Keep in mind now that at the time neither the short differences were considered a charge nor were the long differences considered a credit.

"So that it was put in a frame of reference that if the short differences were a charge should some credit be given for the longs. There was a lengthy discussion on whatthe longs involved and the fact that there were long differences in dividends and long differences in fails and things of this nature that would relate to some of the short differences but which had not been applied against each other. It was inthis discussion that it was concluded that the exchange would not -- could not give credit" --

MR. CAMHY: No, that's been corrected.

-- "It was in this discussion that it was concluded that the exchange could not give credit for the long differences. It was not concluded how much of the short differences should be charged but it was concluded that the exchange would not give credit for the long distances but the exchange would give credit oryou would avail yourselves of credit if the long differences were liquidated.

"Now, I don't know that there was a clear understanding by any of the parties present as to at what point doyou liquidate. When you should liquidate. But it was certainly an understanding -- it certainly was an understanding that the only way you could get any credit for the long differences which would offset a part of any charge that was incurred by the short differences would be through the liquidation route."

Now, I am skipping over to page 118, line 15:

"Q Now, can you recall what rationale underlay the difference between liqudating the long difference and helping capital that way and just merely taking a book credit for the long difference?

"A I cannot. As a matter of fact, I don't understand that there is any substantive difference. Whether or not the long difference is liqudated it's still considered a liquidated , a difference and it's still reserved."

Then on page 119 --

MR. HYDE: I am sorry, the word should be researched.

MR. CAMHY: All right, it's still researched.

-- "It's considered a liquidated difference and it's still researched."

On page 119, line 8:

"Q And what basis did you think they would have for doing this?

"A I didn't even concern myself with what basis. I didn't believe there was any substantive change. Whether or not the difference was liquidated, so long as they kept track of the difference and controlled the item in the same way they would have controlled it if it had not been liquidated."

And then on page 119 -- well, I guess I'd better continue reading on line 16:

"Q But there would have been a difference in that capital overhead, wouldn't it?

"A My point --

"Q There would have been money?

"A My point is --

"Q Yes."

And this is the substance of the answer:

"Whether or not you liquidate the difference does not change your control overthat difference. If you have a difference of 100 shares of American Telephone long you know you have a difference of 100 shares you know it's an item to be --

THE WITNESS: Researched.

MR. CAMHY: "Researched. Managements may decide that they do not want to take amarket risk for that difference and they may decide we'll liquidate that 100 share telephone. However, that has nothing -- that has not changed anything so long as that 100 share telephone difference is maintained in a record and is continued to be researched.

"Q But how does that help capital?

"A It doesn't.

"Q Well, then, why would the idea come out of this meeting that you could improve or get a credit out of liquidated differences and not get a credit out of unliquidated differences?

"A As I responded before, I don't understand the rationale."

MR. HYDE: Mr. Camhy, are you through with the deposition?

MR. CAMHY: Yes.

MR. HYDE: I wonder if I might read one question and answer, one skipped by Mr. Camhy in his reading. That is at the bottom of 118, line 24:

"Q Well, were you aware at the time you left the meeting that duPont was going to liquidate some of its long differences for the purpose of helping its

capital?

"A I was certainly aware that they were going to consider it. I don't know that they had concluded when they were leaving that meeting that they were going to do it."

MR. CAMHY: Your Honor, may I add that the text, the text reads as typed by the stenographer before correction: "I was certainly aware that they were going to credit it. I don't know that they concluded they -- when they were leaving that meeting that they were going to do it."

MR. HYDE: The witness has corrected the word "credit" to read "considered."

THE WITNESS: I think the word "considered" fits with the rest of the questions and answers in that sequence.

BY MR. CAMHY:

Q Now, in the memorandum of the meeting of December 16, which is Exhibit --

THE COURT: 226?

MR. CAMHY: Yes, 226,your Honor -- yes, here it is.

T1B

Q Do you recognize that in liquidating long differences without identifying the source there was always the exposure to possible claim?

A There is always the exposure.

THE COURT: I didn't hear that, Mr. --

THE WITNESS: There is always an exposure.

Q Now as the people claiming these securities showing up, the ones you couldn't identify in your records you would have this claim on your hands.

A If a claim was subsequently received you would have a claim.

Q Now shortly following this meeting did you have a conversation with Mr. Speicher in which you were informed that they were in the process of liquidating these differences?

A Yes, Mr. Speicher called me by telephone I believe and advised that they were liquidating some of the long differences.

Q Did he tell you also that they were buying in the shorts which were being charged against capital, that is those dividend differences?

A They were also buying in -- he did tell me they were also buying in some shorts which were in line with the bro discussion of the meeting that you refer to at this time,

in December of 1969 for Rule 325 purposes there were no charges for short differences and no credits for long differences.

Q I am talking about the dividend differences which the --

A Now at that meeting, if I might just complete my answer to make sure it is understood, at that meeting there was a broad discussion of charging shorts and crediting longs. Just a very broad discussion. And it was a discussion of what the longs comprised -- were comprised of and what the shorts were comprised of and a discussion of did they relate to each other. And it was all in this sense, that there was discussion of charging shorts, either getting credit for, or liquidating longs. That was all a part of the same discussion.

Q But you were told at the meeting that the exchange was going to charge capital for 8.1 million dollars worth of dividends on securities failed to receive.

A Yes, sir.

Q And it was your understanding that the purpose of this liquidation was to help make up that capital deficiency.

A No, the purpose of this liquidation was to provide for some credit for longs giving recognition that you --

A It is not a one-way street, that there are short differences and long differences.

Q Yes, but the object of it was to improve ratio.

A The ultimate result would be to get some credit for the loans.

Q Yes, by liquidating.

A By liquidating, yes.

Q At any time following this meeting did you satisfy yourself, or were you informed --

MR. CAMHY: Strike the question.

Q At any time following this meeting were you informed by duPont or by the exchange that it had achieved capital compliance within the context of your computation and the subsequent meeting?

A I don't recall a discussion of it. I don't think we discussed what differences were liquidated.

Q That's not the question. The question is at the end of December did Mr. Speicher or anybody elsetell you that they had made good the differential between your computation and the further deficiencies which the exchange sought to assert?

A Not that I recall.

Q So then when you left this meeting you knew there were going to be further deficiencies based upon the

exchange's computation and you knew there were going to be some liquidations but you did not know whether capital would be -- the computation would be satisfied by those events.

A When I left this meeting I knew there were going to be additional charges for eight million one. I also knew that there were discussions of areas where there would be reduction of charges as was indicated on the bottom of page 2 of that memo. And the timing about what point would the eight million one be charged and whether or not by the time that was charged there would be other improvements was not concluded. It was an unknown. We left the meeting and there were several things for further consideration.

Q Well, they asserted that the deficiency existed as at the audit date that it should have been in your audit, isn't that right? That was the purpose of the meeting, it related to your audit?

A The purpose of the meeting was to review the audit questionnaire and discuss these items.

Q Yes. Now the capital computation that you made was as at the audit date but reflecting certain further additions made after the audit date.

A At this meeting it was discussed that the exchange

would be charging--

Q Mr. Lill--

A -- some of these items.

Q Mr. Lill, my question: Your computation of capital was made as at the audit date but also reflecting the curing of certain deficiencies made up by the addition of capital which occurred say in October and November and before the date of your opinion.

A Yes, sir.

Q So that if you take your computation and the letters that you submitted with it the capital deficiency mathematically computed by you had been satisfied.

A Yes, sir.

Q Now my question to you is: When after the meeting with the exchange in which it was asserted that there would be these further deficiencies did you find out from the exchange or from duPont that those deficiencies had been satisfied?

A No, sir, as I tried to respond before, Mr. Camhy, the timing about what point that charge would be imposed was not established at that meeting.

Q Well, wasn't it told to you that that charge would be imposed on the same set of figures that you submitted?

A As of a date? No, sir.

Q Didn't they tell you that what they were looking at was the same audit, the September 28th number that you were looking at?

A They were using that audited financial statement, yes. I think the point that I am not making clear is we are talking in interpretation of should differences be charged and if so at what point do they become a charge.

Q Is there anything in this memorandum which suggests that there was some different point from the point of the audit date?

A The memorandum is a meeting as of December 16th.

Q Yes. But the date they were looking at, the status date they were looking at was the audit date.

A That's right. The financial statement was the--

Q So is there any question, is there a question in your mind--

MR. CAMHY: Strike that.

Q Is there anything in this memorandum that suggests that the capital computation which the exchange was working on was not as at the same date that you were looking at, September 28th --

A Yes, sir. It was not at the same date. They were looking at a current ib one.

Q Can you show me anything in this memorandum which

suggests that?

A I don't know whether there is anything in the memorandum that would suggest that, but certainly the discussion of capital is to discuss capital as at the present date.

Q So then it is your testimony that this is a constantly shifting thing?

A That the capital computation is a daily thing.

Q Now getting back, at any time subsequent to your meeting with the exchange did you hear from the exchange or from Mr. Speicher or anybody at duPont that they had resolved the capital problems that arose at this meeting? And that they were in ratio?

A No.

THE COURT: Well, let me be sure I understand. As I understand your testimony, Mr. Lill, at this meeting the use of the figures that you had compiled in terms of the audit, the exchange indicated that they were going to make a capital charge, but as I understand you they had not indicated when that charge would be in effect, at some future time and so forth.

THE WITNESS: That's right.

THE COURT: So that if they had not made the capital charge with the adjustments that had been made

according to your figures at that point the firm was in compliance.

THE WITNESS: Yes, sir.

THE COURT: And the question is when and at what point the capital charge was going to become effectuated and that you were not told and did not know. Now is that what I understand your testimony to be?

THE WITNESS: That's right.

BY MR. CAMHY:

Q Now, Mr. Lill, you were at the meeting as the auditor who prepared the September 28th financials, isn't that right?

A Yes, sir.

Q Would you have been there if the question wasn't whether they were in compliance on the audit date? Wasn't that why you were there?

A The reason the meeting was called was to discuss various items in the audit financial statements. Just what they were comprised of. And also the additional objective of finding out what the firm was going to do about bringing down the numbers and the amounts of these numbers.

Q Yes, but wasn't the purpose of Haskins & Sells being there the fact that it had computed capital at one level and the exchange, using its figures, not your figures

but the figures which you audited,, had reached a different conclusion of capital ratio and wasn't that why you were at the meeting because it involved your audit?

A I was at the meeting because it involved the audit but not because of a capital comp. I was there because we prepared the answers to financial questionnaire and it contained quite a few large numbers that the exchange wanted to get more information on as to what they were comprised of and what the firm was going to do about reducing them.

Q It says on page 1 of the memorandum "The exchange stated that the entire amount of 8,138,344 would be charged against net capital for Rule 325 purposes and inquired further as to how these items differed from any other stock dividends."

A Yes, sir.

Q Did that leave any question in your mind that there was going to be a charge for these items?

A No, there was going to be a charge. No doubt in my mind at that point.

Q Was there anything in your mind except that you were dealing with the question of capital computed as at the audit date and that they had found a different capital than you did?

A Oh, sure, it did, Mr. Camhy. They were going to make a charge but several other things had happened as of -- between September and December 16th. Down in the bottom paragraph which you didn t read it indicates that the second matter discussed was the charge for customer accounts and how could these charges be reduced. And while there is an additional charge of eight million one there may have been a reduction of charges for unsecured accounts or other areas. I am suggesting that the exchange has looked at these things in my experience when they apply an additional charge they also look as to what else happened.

Q What you are saying then is that there is an attempt to retroactively look at it and see what's happened since to determine whether retroactively it has been cured, isn't that right, just as you looked at the additional capital that was put in, the question is have any other events occurred that would cause you to think some help has been given to the ratio?

A Yes. It's a computation that each element changes. The basic requirement for capital could change $10 million in a day simply by a change in aggregate indebtedness.

Q But the only things referred to in this letter are the fact that they think on the audit date you were eight million one out and would charge you accordingly, and, further, they wanted to know what else happened other than the six million that went in.

THE COURT: I think now we have gone beyond the scope of questions and answers, and you are arguing with the witness. I think your positions are clear. Let's proceed.

MR. CAMHY: Your Honor, I would like to read from page 288, line 19, of the witness' deposition.

Q Do you have 288?

A Yes.

Q "Q Did you have any discussions with Mr. Speicher in December 1969, early part of January 1970, with respect to the liquidation of long security differences?

"A Mr. Speicher called me sometime late in December to discuss the liquidation of long securities, particularly with respect to the tax aspects and the trade date versus the settlement date from -- as to which partnership year they would be in.

"Q Did he tell you that they had liquidated approximately $6 million worth of longs?

"A I think at that time I talked to him he probably told me they were going to liquidate. I don't know that he mentioned the amount, the exact quantity, but I certainly knew they were going to liquidate the longs.

"Q Did Mr. Speicher discuss with you that they were going to buy in substantial amount of shorts at that time?

"A He also mentioned that, yes.

"Q Did he mention the figure?

"A No, he may have. If he did, I don't remember.

"Q Does the figure of $4 million refresh your memory on that?

"A He may have mentioned that. I don't

remember him mentioning it. When it comes to the buy in of the shorts the buy in of the shorts in December had less significance to me because they had been buying in shorts all year, whereas the liquidation of longs was only done in December.

"Q Did Mr. Speicher discuss with you the effect that the liquidation of the long securities and the buying of the short securities, and the buying in of short securities on the P&L"-- that means profit and loss, right?

A Yes.

"A On the financial statements?

"Q Yes, in December of 1969.

"A Probably did, yes. Particularly the tax aspects. Which partnership year the items would be charged or credited to.

"Q Did he tell you the results of the purchases and sales which we have just discussed would have the net effect of improving their capital position and net worth by $2 million?

"A I don't believe he mentioned those exact numbers, but he may have. As I say, the -- that would be the effect of just the December items. I think if you took the whole year overall you would probably find

the effect going the other way whereas substantially more were bought in than were sold out, so the effect on P&L for the year would probably have a negative effect on P&L as opposed to a positive effect. That is my recollection. I don't remember him talking about exact numbers and I am not sure when we talked he ever did mention exact numbers."

Q Now, Mr. Lill, I would like to suggest to you that there is a distinction between improving net capital for rule 325 purposes and a credit to net worth which would improve P&L -- that is, it's possible, is it not, to use the proceeds of differences to buy items which were charged against 325 capital without necessarily improving P&L by crediting to net worth.

A I don't believe there is.

Q Let me put it to you this way. Assuming you short circuited one entry, if you simply took the cash and bought in an item charged against net capital, and if you bought in, say, $4 million worth of shorts and sold $6 million worth of longs, isn't it correct that you would be helping capital, net capital, by a larger amount than the amount that you helped net worth?

A But for accounting purposes or computation purposes you have to enter the other two million somewhere,

and to help capital the two million excess would have to be credited to net worth.

Q That's right. But it would be two million net worth whereas you would have helped capital for rule 325 purposes by a larger amount?

A I am not sure I follow you entirely. If you sold out $6 million and bought in $4 million, and credited the excess to net worth, you then have a balanced entry, and for partnership capital purposes, P&L purposes, you have improved capital by $2 million.

Q Net worth capital?

A Right.

Q I am talking about rule 325 capital. If the shorts or dividends that you bought in were charges against capital but were not being charged against net worth because of your own accounting system, why, then, you would have helped rule 325 not by the two but by the whole six, isn't that right?

A That is right. If the short differences were a charge, and you eliminated those short differences, you would have helped net worth by that four million.

Q You would have helped rule 325 capital?

A Yes.

Q And not net worth?

A Capital, you are right.

Q That's right.

A Yes.

Q So it could be, if you bought in -- if you sold out six, bought in four, which were charges against rule 325 capital, although they didn't get into our balance sheet, and you put the extra two into net worth, why, then, you would have $6 million helping rule 325 capital but only two million helping net worth?

A That's right.

Q Thank you.

Now, were you made aware that something substantially like what I just said was done by duPont in late December 1969?

MR. POLLACK: Objection to the form of the question.

Q Were you made aware that the transactions which we have just discussed, and their financial effect, in substance, was entered into and transacted by duPont in the latter part of 1969?

A I was aware that the liquidations took place. I was not aware that the $4 million of securities bought in -- first, as I indicated, I was not aware that the

number was $4 million.

Second, I was not aware that of the securities bought in that all of them were involved in capital charges.

Q Did Mr. Speicher tell you that they had resolved the capital problem in line with the memorandum you had sent him?

A I don't believe he did. I don't remember him advising me as to how they solved the capital problem.

Q Didn't you send him the memorandum so he would have a recorded basis for taking the action that he did?

A No. As I indicated yesterday, Mr. Camhy, I sent him the memorandum when I wrote it to make sure that as I had written it it was an accurate presentation of what transpired at the meeting.

Q Was this because you had some reservations about the rationale for the liquidation process, and you wanted it set forth in writing?

A I had concern about the firm's status, and their status as interpreted by the regulators, yes.

MR. CAMHY: Your Honor, I don't think that was responsive to the question I asked, which was whether you had some reservations about the rationale

for the liquidation authorization that was in that memorandum.

A I did have reservation about the rationale. As I indicated, I do not see a substantive difference between getting credit for longs through liquidation or getting credit for longs in a formula computation. The credit can be obtained in either way as long as it is a proper interpretation under the rule.

Q Is it your testimony that you did not know that Mr. Speicher intended to and did accomplish these liquidations for the purpose of achieving capital compliance?

A For improving capital or following instructions, or for what reason, it was a clear understanding in my mind that he was proceeding with the liquidations.

Q And the reason he was doing it was to get himself into capital compliance?

A To improve capital. Not to get into compliance, but, as I indicated, I don't know they were out of compliance at any given date.

MR.CAMHY: Your Honor, I guess we have been over this. Just one more question.

Q You knew there were going to be $8 million more in deficiency charges arising from these dividends on

fails, and you knew he had to make it good somehow, didn't you?

A But I didn't know -- yes, I knew he had to make it good somehow, but I did not know that there were not other items that had changed so that the $8 million charge could be borne simply by the other changes.

Q Did anybody ever bring those to your attention? Did you ever hear they reached capital compliance by some other route?

A I hadn't heard they were out of or into compliance during this period of time. This was a period of time during which there was no audit underway.

THE COURT: You said you had not heard?

THE WITNESS: I had not heard.

Q Mr. Lill, we are talking about five or six days, from the 16th to the 26th or maybe to the 29th. We are talking about eight or nine days. On the 16th you were told there was eight million more somebody had had to raise, and then you wrote this memo to Speicher about the suggestion that was made at the meeting. Mr. Speicher told you that he was going to do this. He went and did it.

Now, didn't you therefore know that that was the way he was going to solve his problem?

A He was doing it to improve the capital position. I don't know that they were in violation. Mr. Camhy, the capital requirement is a percentage of aggregate indebtedness which for a firm the size of duPont was in the hundred million dollar area. Aggregate indebtedness can change and your capital requirement can change significantly from week to week, so I can't say that I knew that they were in violation on December 16 or on December 26.

Q Now, Mr. Lill, let's just deal with that for a minute. You attached to your computation two documentary proofs of additional capital which postdated your computation by a month, didn't you?

A Yes.

Q If one were to follow your theory you couldn't have had to bother with that, would you? You could simply tell the world or the exchange so much has happened since that date it doesn't matter. But you went tothe trouble of putting the two things on to show the six million had been made good?

A They were significant subsequent events.

Q I am suggesting to you, all of us being human, and having to deal with the passage of time, we nevertheless try to make some sense out of what we are

doing, and wouldn't one of the purposes of this meeting to tell you that they counted it as being eight million more, and what were you going to do about that eight million, and wasn't one of the purposes of Mr. Speicher being, just as you added those two times items, to add on what he did as a result of the liquidations?

A During this period of time computations were being made weekly, Mr. Camhy, by the firm.

Q Yes.

A I was not a party to the computations and I didn't receive them weekly.

THE COURT: Mr. Camhy, doesn't this dissolve into a difference between you and Mr. Lill? You are insisting that it relates to the lack of compliance as of the date of the audit, and Mr. Lill is testifying contrary to you, so what you are really doing is arguing.

MR. CAMHY: May I be permitted a word of argument at this point, and not a question? I wish to make a point to your Honor, which is that the point I am trying to make with the witness is that they all had to deal with the passage of time, and he did it by adding on numbers, they did it by pointing out that they recomputed the audit. They told him to raise

some money. But all of them always had to deal with this passage of time but that didn't prevent them from shooting at the audit date.

THE COURT: Maybe I am not understanding what is going on, but it seems to me what Mr. Lill indicates is that the attachments to his audit showing additional funds was done because when he made the audit he found these deficiencies and that was necessary in order to show that matter had been somehow cleared up.

He is indicating at the meeting on December 16 even though the charge was made it was in futuro and had nothing to do with the time he made his audit, and you insist it does, and he insists it doesn't. At least that is as I understand your two positions.

MR. CAMHY: Thank you, your Honor.

Q Subsequent to the year end, December 31, 1969, the duPont Company put out the formal report with three sets of figures, including your audited, and then the December 31 unaudited, which has been marked as an exhibit here already and introducedin evidence, the big brochure?

A I am aware of that, yes.

Q It was not on an audit or an examination basis, but you were given a copy of it for your

information?

A Yes, sir.

Q What I really mean is that you had available to you the December 31, 1969 unaudited figures which the company published?

MR. HYDE: Before or after publication?

MR. CAMHY: Before publication.

A I saw those financials in proof form, yes, sir.

Q Then the company also published a March 31, 1970 set of unaudited figures, and that is Exhibit 244.

Like the previous brochure, was this one made known to your office at or about the time it was printed?

A I don't recall that it was, but it may have been. This is an unaudited statement of condition that a broker sends out quarterly,and we are seldom involved with them.

Q Did you receive or have an opportunity to look at this at or shortly after the time it was issued?

A Yes, I did. I saw it after it was issued, I believe.

MR. CAMHY: Your Honor, I offer it in evidence.

MR. HYDE: As against Haskins & Sells?

MR. CAMHY: Yes. Just to show he knew it.

MR. HYDE: After the fact.

MR. CAMHY: After it was issued, yes.

MR. HYDE: For that limited purpose I have no objection.

MR. CAMHY: I want to make my position clear. I mean sometime shortly after it was issued, not a year after, but a week or two after.

MR. HYDE: That is what I understood the witness' testimony to be.

MR. BROOKS: No objection.

(Plaintiffs' Exhibit 244 was received in evidence)

Q Mr. Lill, in connection with your work for duPont in connection with its audit, were you aware that the previous spring the firm had been cited by the exchange for violation of record keeping rules of the exchange and had been, I believe, censured and fined?

MR. CAMHY: Is that right, Mr. Brooks?

MR. BROOKS: I am no more a witness today

than I was yesterday, Mr. Camhy.

Q I put to you censured and fined for that.

A Spring of what year?

Q '69.

A During the course of our audit as of September 1969, we were aware that they had been censured during that year, yes.

Q For record keeping violations, failure to keep records in accordance with the exchange rules?

A If that's what it was. It's not fresh in my mind, but we were aware there was a censure, yes.

Q And were you aware in the fall of 1969, and the early spring or late winter of 1970, that there was then pending before the exchange another set of violations relating to customer complaints?

A I became aware of that, but I believe I became aware of that sometime during 1970. I don't think that was present at the time of our 1969 audit.

Q I am talking about early 1970.

A I became aware of that, but I may not have become aware of that until our 1970 audit, which was in September.

Q Didn't you know about it early in 1970?

A I don't believe I did, Mr. Camhy. Early

in 1970, my efforts are directed -- were directed towards clients other than duPont outside the brokerage area and I was not spending much time at all on the duPont client as such.

Q Do you think anybody in your firm knew about it?

MR. BROOKS: I object to the question.

MR. HYDE: I think we can stipulate it was reported widely in the Wall Street Journal and New York Times if that will suit your purpose.

MR. CAMHY: My question is sometime prior to the time it was reported, say a month, did Haskins & Sells know.

MR. HYDE: You will have to ask him.

A I really don't remember when I became aware of it, Mr. Camhy, for the first time. It could have been through thr press, it could have been as a part of our audit. I don't remember which came first.

Q These were very heavy fines, and these were very serious charges. Do you remember anything about it now?

A I remember the charge, yes. I remember they were for customer complaints.

Q Early that winter, and they resulted in

fines and censure in the early part of the spring or the latter part of the winter, do you remember knowing that at the time?

A At what time?

Q January 1970.

A I don't remember if I knew at that time. I don't think I did know it at that time.

Q When do you think you first knew it, when it was made public?

A I certainly knew it when it was made public, and I knew it as part of the 1970 audit. When we went in to commence the 1970 audit we discussed it.

Q Do you recall it being discussed at this meeting with Mr. Bishop, that there were complaint charges against the firm then pending?

A I don't recall it being discussed.

Q Were you ever consulted by duPont in or about the latter part of February, 1970, about the latter part of February, 1970, about a set of draft charges which duPont had received from the exchange relating to a continuing capital violation dating back to the previous June?

A I'm sure I was aware of it or became aware of it. I can't place the exact time when I became

aware of these things.

Q My question is: Did you know that they were being asked to respond to the exchange's contention that they had been in chronic capital violation? Take out the word "chronic" -- from June to December of 1969, and that they had to respond to that contention?

A As a part of our 1969 audit I was aware of the report that you introduced yesterday, that the exchange had rendered to duPont --

Q I am talking about a subsequent set of draft charges against them made in the early part of 1970.

A I probably wouldn't have received that until a part of my 1970 audit.

Q Do you recall Mr. Speicher or Mr. Gay or anybody at duPont asking you to help them in preparing a response to these charges? For that purpose I would like to show you just two documents which might help you refresh your recollection. One is Exhibit 251, which has not been offered, and the other is Exhibit 123, which has not yet been offered. (handing to witness)

A I don't remember being consulted specifically on these matters. I became aware of these, I believe, as a part of our 1970 audit.

Q But not before your 1970 audit?

A I don't believe so.

Q You can recall no conversation with Mr. Speicher or Mr. Gay in which they said that they had these charges of the exchange that they had to respond to and they wanted you to help them put their record together so that they could frame a response?

A I don't recall it. It may have been. I just don't recall having discussed that as a separate item or in that interim period.

Q Would you ordinarily have been consulted on that kind of a problem? Had you been consulted on that kind of a problem in the past?

A That varies. Some clients consult with us before they respond. Others do not. And clients differ. One client may ask for consultation for one matter and not on another. But I can't generalize.

Q So that your statement is you just don't recall one way or the other?

A I don't recall.

Q Did a time come when you performed services for Hirsch and Company in connection with Hirsch-duPont merger?

A Yes.

Q Wasn't that May and June of 1970?

A My first involvement was, I believe, around June 16 or June 17.

Q But your firm had done the auditing for Hirsch & Company for several years, hadn't they?

A Yes, sir.

Q Do you know how many years?

A Many years. I don't know the exact number.

Q And Mr. Petrillo was in charge of that engagement, too, wasn't he?

A Mr. Petrillo was our senior brokerage man during this period of time, and he had responsibility for the firm's entire brokerage practice. I believe there was another partner in the firm, Mr. West, who was responsible during the years immediately preceding the merger.

Q Did you also do the tax work for Hirsch & Company, the partnership tax return?

A I believe our firm tax department did provide tax services, yes.

Q In connection with the Hirsch-duPont merger, Exhibit 235, please.

Mr. Lill, this appears to be the last of certain letters which defined the services you were to perform at the closing. I am just giving you the last

one, because it seems to me that is the only one that is important. Does this reflect the services which you were to perform in connection with the Hirsch-duPont merger?

A Yes,it does.

Q Did you perform these services?

A Yes, we did.

MR. CAMHY: Your Honor, I offer this.

MR. HYDE: No objection. May we have a stipulation this is the letter which should be annexed to Plaintiffs' Exhibit 1 for identification as an exhibit thereto?

MR. CAMHY: Would you have any objection to offering Exhibit 1 at the present time and marking them both? Your Honor, Exhibit 1 is the contract which the Hirsch people made with duPont to merge the two firms. I would offer it now, if there is no objection, so that we could have the two together.

MR. HYDE: I have no objection. Plaintiffs' Exhibit 235 was attached to the original of the so-called merger agreement as an exhibit.

THE COURT: 1 and 235 are received.

(Plaintiffs' Exhibits 1 and 235 were received in evidence)

BY MR. CAMHY:

Q In connection with the work that you did on the merger or otherwise did Haskins & Sells have occasion to receive and review a statement of financial condition of Francis I. duPont dated April 30, 1970 which is Exhibit 243 (handing)?

A I do not believe we had any involvement at all with this statement.

Q The question is:

Did you see it at the time?

A I don't believe I did.

Q Did a time come in August or September of 1970 when you were asked by the exchange to perform some special consultant work in connection with the state of affairs at duPont, the financial condition and the back office operation?

A Yes, I believe it was September, Mr. Camhy, that the exchange asked that we perform certain services with respect to duPont.

Q Well, wasn't it as early as August, early August that they alerted you to the fact that --

A There is a letter on that matter. Whatever the date of that letter is is the right date.

Q Well, I show you one dated August 4th.

MR. HYDE: What number is it?

MR. CAMHY: August 4th, 1970, Exhibit 232.

Maybe we can just do it by refreshing the witness' recollection (handing).

A Yes, it was August 4th, or probably the day before that.

Q Now, wasn't one of the critical areas of your consultation the question of the unresolved differences?

A Yes. The progress being made in their research efforts was the biggest factor that was concerning the exchange at the time.

Q Do you remember a meeting with the special committee of the New York Stock Exchange which took place on September 28th wherein you tried to give them the benefit of your views before the audit was finished?

A Yes.

Q And do you recall that that meeting was transcribed by a stenographer?

A Yes.

MR. CAMHY: Your Honor, I have the minutes of that transcription and I would like to offer it into evidence. Will there be any objection?

MR. BROOKS: There will be unless the witness can identify it as the minutes.

MR. CAMHY: All right.

Q I show you Exhibit 187 (handing).

A This is a transcript of my discussion at that meeting.

MR. BROOKS: Your Honor, I am going to object on another ground, as long as we have passed the identification hurdle. As I understand it the line of inquiry is directed at the period of time September 27, 1970, well beyond the point at issue in this case which was on or shortly before July 2, 1970. It also is an audit of a firm which did not exist before July 2, 1970. Before July 2, 1970, the firm that Mr. Lill is now talking about was really three firms: Glore Forgan, William R. Staats & Company, Hirsch & Company, Francis I. duPont & Company.

So what we are now talking about is a new firm, a number of months later.

For that reason I object to the admission of this document and further testimony in this area on the grounds of relevancy.

MR. HYDE: I concur in Mr. Brooks' objection, your Honor.

MR. CAMHY: Your Honor, I may be able to resolve the problem by simply asking the witness if he made certain statements which do relate to the earlier year and

the earlier audit and then reading the statements as admissions of the witness.

May I proceed, your Honor?

THE COURT: I had assumed from the questions that this transcript involved problems which existed in the old firm that the Stock Exchange was concerned about and discussed with Mr. Lill. That is what I understood.

MR. CAMHY: No question about it.

THE COURT: And if my understanding is correct there is no basis for the objection.

MR. BROOKS: Your Honor, I don't think your observation is correct. I think the conditions that Mr. Lill is talking about exist in a firm called duPont, Glore Forgan & Co. which is a composite of three prior firms.

Now, if Mr. Lill is able to identify out of that composite firm factors that existed in the firm of Francis I. duPont & Co. before July 2, 1970, I think that might be a proper area of inquiry. But until he does that I think the area of inquiry is objectionable.

MR. CAMHY: Your Honor, may I read and then have objections as I read?

Q Mr. Lill, do you have a copy of it?

A Yes.

Q Page 9, in the center.

"THE CHAIRMAN: I believe Mr. Litt wants to ask a question.

"MR. LITT: Maybe it's the same question. Isn't it a fact that the bulk of these figures that we are talking about, the six long and the twelve short, have been carried forward since about the date of the last audit?

"MR. LILL: It has changed significantly from the last audit, but it dates back to the last audit."

Then again on page 11, at the bottom.

"MR. LITT: Wouldn't it be fair to say that if your audit indicated there still existed, let's say 12 million for the sake of this discussion, that your audit showed that there is still 12 million of short record differences still being carried forward and they existed at the time of the other audit, that they should be written off?

"MR. LILL: If this audit reconfirms the existence of those, yes. I might mention one other point on those differences now. Once the audit control is released after the filing of the record which was late in November, as I recall, then the duPont organization has their own people that control

this account. We do not keep full time control as we do during the time of the audit up to the time of the report.

"So there have been entries in that from last November till present, and there is some question in our mind as well as in duPont's mind that many of these may not be differences at this point. Really they are waiting for this audit to confirm or re-confirm their existence."

Then there is one other point on page 14 through 17.

"MR. CUNNINGHAM: My second question is related to the research. When people from F. I. duPont talked to this committee about a week ago they mor or less inferred what you are talking about, that maybe these differences aren't differences --"

THE COURT: What page is that on?

MR. CAMHY: Excuse me. Page 14, at thee bottom.

THE COURT: I thought you said 17.

All right.

MR. CAMHY: "And that maybe these differences aren't differences and this is really my second question.

"I'm not sure whether they implied there was a bad audit last time, you know, miscounting or whatever it might be, or whether from November on after Haskins & Sells gave control of this account back to them that it may have been mishandled. But they inferred that you concurred that you would not expect the differences to show up as they are now on the books, the 12 million short and the 6 million long. If you had said something in that regard, could you explain that?

"MR. LILL: Yes. My apprehensiveness about the items in this account is really on the point of the entries that took place after we released control. There were a lot of entries cleaning up differences, a lot of entries creating new differences. This is the open question in my mind. There is no question in my mind as to the accuracy of the counts or of the differences as of the date we started the audit and the date we reported on them.

"We controlled that and there was a duplicate control of everything that went through --"

Then Mr. Cunningham:

"Well, in the last two or three months I know that you have been overviewing some of the things

that they have been setting up to clean up things, and so forth. Have you come to a specific conclusion that the entries are wrong in that account or what led them to make that comment?

"MR. LILL: I don't know what led them to make that comment. I expressed it to them that I -- I -- I can tell you why I expressed it. First let me answer specifically. During the period I was observing the account and I had a staff there observing it on the premises observing it, there was very little activity in the account.

"They took on this group of extras and they have been working on it. But little progress has been made. The reason I expressed apprehensiveness at the time was, first I looked at the activity in the account and it was very active during December, January and February of this past year. And the thought that was being expressed then was, well, maybe it's time we liquidate these items.

"It was my recommendation not to liquidate until they were sure they had a handle and that these were differences.

"MR. CUNNINGHAM: So there isn't anything that led you to believe they may or may not be differences

just a philosophy about liquidating.

"MR. LILL: Well, that's right. A philosophy about liquidating and the activity in the account during those few months."

That is all I propose to read, your Honor.

MR. HYDE: Well, your Honor, as I understand Mr. Lill's testimony which has just been read into the record he is commenting on what was found out during September 1970 when Haskins & Sells went in to conduct its 1970 surprise audit and also do the review for the Stock Exchange which commenced in August of 1970.

All of these events are concerned with what he learned after the date of the merger. There is nothing in here to indicate knowledge prior to the merger on the part of Mr. Lill or anyone else at Haskins & Sells.

THE COURT: Well, I read it diffently. I read it as indicating problems that he had learned had existed prior to the merger and that had not been cleared up. In any event --

MR. HYDE: They may be part --

THE COURT: (Continuing) The parts that have been read are the only parts of the document that Mr. Camhy wants in, in any event.

MR. HYDE: I appreciate that. I appreciate,

your Honor, he is commenting on events that existed prior to the merger, but he is saying that Haskins & Sells learned about this after the merger, that was the point I wished to make.

THE COURT: All right.

MR. CAMHY: Your Honor, I would next like to offer into evidence Exhibit 28 which is the long form questionnaire for the year -- rather, as at September 27, 1970, Exhibit 113, which is the material inadequacies letter of November 25, 1970, and the statement of financial condition as at September 27, 1970, which bears the opinion of Haskins & Sells, and that is Exhibit 23.

MR. HYDE: Again, your Honor, I object on the grounds of relevance. This concerns a surprise audit as of September 1970, some three months after the effective date of the merger. There is no allegation in the complaint with respect to this audit.

MR. CAMHY: Your Honor, I --

MR. BROOKS: Let me make my objection and you can respond to both.

I add to my Mr. Hyde's objection, which I adopt, the fact that this is an audit of the firm of duPont, Glore Forgan & Co. which is now a tripartite merged firm reflecting three firms, Glore Forgan, Hirsch, Francis I.

duPont. That is the firm that merged firm that Mr. Lill was auditing in September of 1970.

There is no claim in this complaint with respect to Glore Forgan & Co. or any of its constituent parts, or of Hirsch & Co.

This is not a firm which is the subject of this lawsuit, and I add that to Mr. Hyde's objection.

MR. CAMHY: Your Honor, I am offering these first --

THE COURT: May I see the documents?

MR. CAMHY: Yes, your Honor (handing).

THE COURT: All right, I'm listening.

MR. CAMHY: I'm offering these first because Mr. Lill is in a position to identify them and they do relate to the events which occurred after the merger which caused the injury to our clients. So the first reason I am offering them is to show that there were substantial reserves taken on the new company's balance sheet and that this caused various other problems which ultimately resulted in our clients' loss.

Secondly, there are footnotes in the balance sheet, and there are statements in the material inadequacies letter which showed relationship as seen by the accountants between the material inadquacies of the current year 1970

to those of the previous year, and the sources of those inadequacies.

3 THE COURT: Well, the objection is overruled.

Exhibits 23, 28 and 113 are received.

(Plaintiffs' Exhibits 23, 28 and 113 were received in evidence.)

xx BY MR. CAMHY:

Q Mr. Lill, would you look at Exhibit 28 (handing)?

In answer to Question 13 do you see the item "Valuation of securities count differences"?

A Yes.

Q Are those the count differences whch are referred to in any references you make to count differences of the current audit in either your material inadequacies letter or in the footnotes to your financial statement?

A Yes.

Q And those are long 10 million short 19,948,000?

A That's right.

Q Now turning to the material inadequacies letter, which is Exhibit 113 --

MR. CAMHY: Your Honor, I would like to just call your Honor's attention to the top of the second page of Exhibit 113, the first three paragraphs of that page.

Q Now turning to Exhibit 23, Mr. Lill, the notes

to the statement of financial condition, Note 2 relating to reserves.

MR. BROOKS: May I inquire whether the exhibit in evidence has a number of handwritten notes?

MR. CAMHY: Yes. I don't know what they are.

MR. BROOKS: Unless they are Mr. Lill's I will object to this being in evidence with handwritten notes.

MR. CAMHY: I would consent that the handwritten notes be stricken and that a copy be substituted without them.

THE COURT: All right. I have a great many handwritten notes on this one as well. All right, you can furnish a clean copy.

MR. CAMHY: Yes, we will, your Honor.

I call the Court's attention to Note 2.

THE COURT: All right.

BY MR. CAMHY:

Q Mr. Lill, do you know who Mr. Charles A. Rubin was at the New York Stock Exchange?

A I don't know his exact title. I do know him and I knew he was with the Stock Exchange.

Q Do you remember that he was put on the duPont, Glore Forgan account to try to investigate into the operational problems and the differences?

MR. BROOKS: I object to the question, your Honor.

THE COURT: Really I agree, I don't see the point of that.

MR. CAMHY: Well, your Honor, I am trying to establish a conversation which took place between certain of the employees of Haskins & Sells and Mr. Rubin about the differences and the audit -- between the audits.

THE COURT: Well, if Mr. Lill was part of the conversation ask him about it.

MR. CAMHY: Well, he wasn't a part of the conversation, your Honor. Certain of his associates were. What I am trying to do is confirm with him whether he would agree with what was said in this purported transcript.

MR. HYDE: I object to that, your Honor.

THE COURT: I think, Mr. Camhy, you are going to have to bring that out by a more direct source.

MR. CAMHY: Your Honor, may I inquire of Mr. Hyde whether Mr. Bonstein is still with Haskins & Sells?

MR. HYDE: I believe he is.

MR. CAMHY: Mr. Hyde, would you produce Mr. Bonstein so I can read that to him and ask whether he had this conversation? I thought I might be able to show a certain --

MR. HYDE: I will have to take that under advisement. I don't know what the conversation is or the relevance of it, your Honor. Why don't I discuss it with Mr. Camhy later.

THE COURT: All right.

Well, in any event, let's take a ten-minute recess.

(Recess.)

T4a

(After recess.)

MR. CAMHY: Your Honor, after discussing the matter with Mr. Hyde and the witness I believe I am authorized to state that in lieu of my calling Mr. Bonsteen, Mr. Lill and Haskins will agree that the paragraph I am about to read from a memorandum that they agree in substance with the contents of that paragraph.

MR. HYDE: Subject to my objection on the grounds of relevancy, your Honor. Again, this pertains to what they discovered in 1970.

THE COURT: All right.

MR. CAMHY: I am reading from a memorandum which is dated December 14, 1970. It was furnished to me by the New York Stock Exchange, and it was made by a Mr. Rubin, who was then an employee of the exchange, with a copy to Mr. Bishop, Mr. Stock, and Mr. Cunningham, who were senior employees or officers of the stock exchange. It relates to a conversation which he had with Mr. Bonsteen and Mr. Shea of Haskins & Sells.

On page 3 of that memorandum Mr. Rubin writes at the last paragraph --

MR. POLLACK: We have not yet seen that memorandum, your Honor, and would like to see it before it is read.

MR. BROOKS: I point out that nothing Mr.

Camhy has said is evidence, of course.

MR. CAMHY: I will introduce this at the right time, of course. It is pre-marked number 213.

(Pause)

MR. POLLACK: Your Honor, we object to this document, or any portion of it, and particularly the portion Mr. Camhy seeks to read, on the grounds it is hearsay.

MR. CAMHY: Is it our party?

MR. POLLACK: Yes.

THE COURT: The matter is received only as consented to with regard to Haskins & Sells.

MR. HYDE: Subject to my objection on the grounds of relevancy.

xx (Plaintiffs' Exhibit 213 received in evidence.)

MR. CAMHY: I am only offering one paragraph.

MR. HYDE: This is one on the understanding we are avoiding calling another Haskins & Sells witness.

MR. CAMHY: I am not offering the exhibit. I am just going to read a paragraph from it pursuant to this agreement.

I am about to read from this paragraph on page 3: "In our discussions with Messrs. Bonsteen and Mr. Shea of Haskins & Sells we reviewed the 1969 material inadequacy report and spoke to the auditors about what they would be

incorporating in this year's report. Most of what was said in 1969 also will appear in 1970, which is to say that duPont really did not take the corrected (sic) action that was suggested to them as a result of the previous years' In reviewing this information, the auditors indicated that there was a lack of overall controll of entries made in the firm, or the journal entries more specifically. The margin department is not the control of all customer entries, and it should be. In following up on this, I checked with the margin department and there was also a lack of control between it and the dividend department. This of course is quite critical in that an entry to a customer's account may affect previous dividend record dates. Another item mentioned by the auditors, was that there were too many SEG instructions issued by the computer. This ties in with the inadequate equity or margin package with (sic) EDS is presently using."

THE COURT: As I understand it, the stipulation is that accords with Haskins & Sell's view as of what time?

MR. CAMHY: As of that date, which is in late 1970, but reviewing the previous year.

THE COURT: I know, but what's the date of the memorandum?

MR. CAMHY: December 14, 1970.

Q Mr. Lill, turning your attention to the year 1969, and then again to 1970, both audits, I ask you about the following observations, whether you would concur in a statement about them relating to the degree of controls and systems. You can say yes for 1969, no for 1969, yes for 1970, etc.

First, there is no internal auditing.

A May I refer to my two letters, my one in 1969, [illegible], and my one in 1970, where I express--

MR. CAMHY: I prefer he testify from memory.

THE COURT: Obviously, if he won't testify from memory he can refer to some document or documents to refresh his recollection.

MR. CAMHY: To agree here we are dealing with the accuracy of those documents. I would first like an answer based on recollection.

THE COURT: I will agree with that. Mr. Lill, if you have a recollection without reference to a document then say so. If you don't, and you feel you need to refer to the document, feel free to do so.

Q First, there is no internal auding?

A I don't recall as between 1969 and '70.

Q Well, 1969 alone.

THE COURT: Let me be sure I understand what you

are asking. Are you asking Mr. Lill whether he agrees with this in the respect of what was happening with the firm he audited as of 1969 and 1970?

MR. CAMIY: Yes, sir.

Q In 1969, could it be said that there was no internal auditing?

A I don't believe so on memory.

Q Could it be said there was inadequate internal auditing?

MR. BROOKS: I object to that question.

THE COURT: The objection is overruled.

A I don't believe so. Internal auditing is subject to definition, and inadequate is--

Q Just dealing with 1969 alone now, there is no formal responsibility for account analysis and a complete balancing or cross checking.

A In any specific area?

Q Yes. Customer accounts.

A Customer accounts?

Q Yes.

A That was true in 1969, as I recall.

Q Many departments lack control of journal entries and tie in with that sent to date a processing versus that affecting the records.

A I believe that was true in 1969.

Q Audit trails have the basis of corrections or reasons for use of journal entries are mostly lacking.

A That was present. I don't remember exactly when corrective measures were taken on journal entry control.

Q There are no cycle box counts except for purposes of dividend record dates.

A I believe that was so in 1970.

Q How about 1969?

A I beg your pardon, in 1969.

Q There is no error analysis in individual departments or classifications thereof, meaning classifications of errors, reporting thereof, reporting of errors, and analysis to correct causes, an internal system for the finding and correction of errors?

A I don't recall. May I ask, are you reading from something fixed or--

Q Yes.

A I interpret what you just read to me differently than you did. That's the only reason I asked.

Q Let me put the question a different way. In 1969, did you observe that there was an internal system in duPont for discovering errors and getting to the bottom of them,

systematically? That is to say, that they had an organized system there for finding errors and analyzing them?

A During 1969 there were improvements being made in this, new errors were not being generated. Exactly when in 1969 I don't know, but the reason I am vague, Mr. Camhy, is the paper work crunch was '67, '68, and early in '69. That's when there was this tremendous back office breakdown. It was in '69 that improvements started to be put in place, and I am having a little difficulty in determining just when some of these went in.

Q If you can, can you tell me that as at the date you reported on systems in duPont at that time that you observed that they then had an organized systematic way of discovering and resolving errors?

A They had an organized and systematic way to balance the stock record and get stock record cleanups.

Q I am talking about detecting the causes of errors within the system.

A I am trying to differentiate in my mind what the difference in my answer and your question is.

Q It is the difference between having a stack of errors and attempting to resolve them for financial purposes and having a system within the firm of finding out where these errors were coming from and what improvements

could be made within the firm to avoid having further errors?

A In 1969 there were improvements in that, and they did have controls, but I have to make one thing clear. The stock record each day comes out for all brokers with out of balances. You have what they refer to as take off breaks and these in many people's minds are errors, because there is an unbalanced entry that goes through. Then as the normal routine operates they are cleaned up and balanced in the following day.

In my interpretation I consider that a procedure that controls errors, but I don't want to respond to you and say that they did have a procedure that would cause no stock record breaks to exist.

Q My question is exactly the second question. Did they form or did they have a system which was getting to the bottom of where these errors had come from and avoiding their future repetition?

A In 1969, they did. They were along with that a stem toward the end of the year.

Q Toward the end of 1969?

A Yes.

Q How about control of securities and securities moving to and from transfer? Did they have controls?

A Early in 1969 there were difficulties in that. It was late in 1969 when they undertook a crash program, as I recall, to clean up the transfer control, and I think they put in a new system in 1969.

Q By the time you audited them in 1970, did they have control over their securities?

A In 1970, there was much improved controls in transfer.

Q Was it adequate?

A We considered it adequate, I believe.

Q Did you consider it adequate in 1969, when you audited?

A No, the procedures in being in 1969 were not considered adequate.

MR. CAMHY: Your Honor, I wish to now offer a set of answers to financial questionnaire as of April 30, 1971.

My purpose in offering this is to connect it up with the latter part of my case, part of which will be to show that the subordinated defendant which we received was ultimately disclaimed by them upon the ground that there had been no equity there the previous December. They used as a basis for their refusal to pay, which ultimately wiped out what little my people had left in this, the Haskins & Sells audited answers to financial questionnaire and that was preserved in the notes set forth therein.

All I am asking the witness to do is identify

the document so then I can use it at a later time. I don't think this involves us in any of the substantive charges against Hasking & Sells, but I want the document identified so I can offer it in evidence.

Q Mr. Lill, would you look at Exhibit 225, premarked.

A Mr. Cambv, page 2 I don't believe belongs in the document as such. That is not something that would normally appear in our document. This is the cover sheet and the opinion and the answers to financial questionnaires.

Q And then there are some notes?

A Yes, sir.

Q Thank you.

Mr. Lill, do you recall that there was to be an audit of duPont in May of 1970, which was decided to be postponed because of the pending merger?

A Yes, I believe that's right.

Q Ordinarily, you would have done an audit at that time, isn't that correct?

A As I recall, by requirement we advised the New York Stock Exchange before the first of February each year as to which third of the year we are going to do the surprise examination. It's done on a confidential basis. Then I proceed to schedule the engagements.

I believe initially duPont was scheduled for May, and I subsequently changed the schedule to avoid doing an audit around the same time that a merger was to take place.

Q Referring to Exhibit 52, Mr. Lill, are you familiar with this form? I don't mean this particular one, but this format?

A I am familiar with it, yes.

Q Can you tell us what it is?

A It's an internal report that is prepared by brokerage firms and submitted to the New York Stock Exchange. They have had various titles through the years. Operations questionnaire, or --

Q Now, looking at the form where it says At the second box under A:

"Unresolved stock record difference positions with no known related ledger amounts."

Then it says under that total number thereof total long market value thereof, total short market value thereof. And then there are two dates, one for May 31 and one for April 30.

A Where is that?

Q Page 1. June 11 compared to May 7, 1970, is the one I have.

We are just looking at different dates. June 11, May 7, fine.

MR.CAMHY: Your Honor, I think the date is May 31 and April 30, but --

Q I guess you are looking at the date at which computation was made, is that correct?

A Yes. The as of date for the numbers are June 11 and May 7, but I think the timing of filing is May 31.

Q I understand.

Now, it's my impression, Mr. Lill, that in these reports the numbers that are carried are the numbers from the last audit as affected by the endeavors to resolve these differences, with minor exceptions.

MR. BROOKS: I object to that. There is no foundation for Mr. Lill giving an opinion on what's done in a form filled out by the firm and submitted to the New York Stock Exchange. He doesn't know. He doesn't fill these out. He didn't fill these out.

Q If you know, Mr. Lill?

A I don't know. We have not participated in these forms.

Q Do you review -- not review, but did you from

time to time see any of these forms in the course of your work?

A We may have referred to them from time to time. I don't recall any specific situations of that nature with respectto duPont. From time to time we do refer to operations questionnaires, and so forth.

Q Do you remember remarking that. or do you remember reviewing the questionnaire just shortly prior to the merger just on a casual basis and remarking that one, Mr. Swanton, had analyzed it very well?

A I remember seeing a memo of Mr. Swanton's identifying the problem areas of duPont and remarking that he did very well in identifying the problems.

Q In relation to a questionnaire, wasn't it?

A I don't believe so. I don't believe so. Unless I recognized numbers from our audited questionnaire.

Q On page 266 of your testimony, Mr. Lill, at the bottom --

A You mean where I say I observed to my associates that he did a pretty thorough analysis of the answers to the financial questionnaire of the firm?

Q Yes.

A That is the long form.

Q Fromthe previous September?

A Yes.

Q Why would that have related to a memo which Mr. Swanton --

MR. HYDE: I object to the question why would that have related to something in some other person's mind.

THE COURT: Objection sustained.

MR. CAMHY: I think that concludes what I have, if you will just give me another moment to look through this.

Q This memo of the conversation of December 16 that you had with Mr. Bishop at the exchange about the differences, a time came later when you sent copies of that to the exchange and to the SEC, much later, isn't that right?

A I believe that's right, yes.

Q And that had to do with inquiries by the exchange or by the SEC about events relating back to then?

A I believe so, yes.

Q So that by the time I had seen you at that examination before trial you had sent one copy of it to Mr. Speicher, is that right?

A When the memo was prepared I believe I only

sent one to Mr. Speicher. I don't believe I distributed it to anyone else, but I may have.

Q Later on there were inquiries by the SEC and maybe by the exchange and you sent copies to them, is that right?

A There were many inquiries I made, and I believe a copy was requested and I provided them with a copy.

Q Do you remember an inquiry by a Senate Committee?

A To me directly.

Q Or through the SEC to furnish to the central committee?

A No, sir.

Q But there was an SEC inquiry and maybe an exchange inquiry?

MR. BROOKS: I object. I don't see any relevance to the issues in this complaint.

MR. CAMHY: I will get to that in a minute.

THE COURT: Mr. Camhy, you ought to get to it fast and enlighten me about what this is all about.

Q Mr. Lill, on page 140 of your deposition, will you look at the bottom -- maybe I am confused,

look at the bottom of page 140, line 18. Then continue to the top of the next page.

MR. CAMHY: Your Honor, I would like to read that aloud, if I may.

"Q And can you tell me again as much of that conversation as you remember?

"A I don't remember much of it. I just know that in the discussion it was brought up that they were going to liquidate some of the differences, they were going to liquidate some of the longs and some of the shorts and I really don't remember the details of --"

"Q Did you make any memorandum of that conversation?

"A No, sir."

Q Mr. Lill, I suggest -- my impression is that we are talking about the same conversation, and that you told me you didn't make a memorandum. I suggest that --

A Wait until I identify the conversation.

Q I think maybe that if you would review this and tell me I am in error I will accept your statement, but --

MR. BROOKS: I can do that, your Honor, because the lines above on page 140 refer to a telephone conversation with Mr. Speicher.

MR. HYDE: This is not the December 16 meeting at all. He is being asked about a telephone call.

MR. CAMHY: That is really what I am trying to find out, your Honor.

THE COURT: As I understand it, it was your inquiry, but you are now eliciting from him the question you are asking.

MR. CAMHY: I am confused. I got the impression he told me he hadn't made a memorandum of that conversation, and I am trying to get the witness to unconfuse me or tell me how he made the error and maybe I am the one who made the error and if so, let the witness tell me that.

A Going back further on the page 140, I think the conversation refers to my conversation with Mr. Speicher and that I did not prepare a memorandum of that conversation.

MR. CAMHY: Thank you, Mr. Lill. I have nothing further, your Honor.

CROSS-EXAMINATION

BY MR. HYDE:

Q Mr. Lill, in your direct testimony I believe you used the term surprise examination or surprise audit.

Would you tell us what that means in brokerate house accounting terms?

A During the periods prior to 1973 each broker had to engage a public accountant to do a surprise examination during the ensuing calendar year, and that audit was to be done as a surprise basis and to be performed in accordance with a very thick set of audit requirements that were provided by the SEC and the stock exchange as a part of the form of the answers to financial questionnaire.

Q How did that type of audit differ from the ordinary business audit?

A In a normal audit that we would refer to in the profession as a general audit, that would involve the audit of a balance sheet and an income statement, and it would audit the financial position as of a date and the results of operations for the period prior to that date. Whereas the stock exchange audit, or the surprise audit, was a balance sheet audit only, and did not require a financial statement covering the results of operations for the period ending on that date.

Q As a consequence of this distinction did the type of audit procedures followed differ between the general audit and the so-called surprise audit?

A Well, they were different in that we did not have to do what we referred to as a test of transactions of the income and expense accounts for the period. And they differed on the balance sheet in that we had to do for a broker 100 per cent, whereas for any other company where we followed generally accepted auditing standards we are permitted to test.

In the broker we have to do a balance sheet, balance sheet only, and do a 100 per cent count and confirmation.

Q In connection with the surprise audit as it was conducted in those years prior to 1973, what reports was the auditor required to file?

A The auditor had to file answers to financial questionnaire with the New York Stock Exchange and the Securities and Exchange Commission. And that was comprised of three parts:

One part was a very detailed statement of financial condition in a fixed format; the second part was supplementary schedules; the third part was supplementary information for purposes of computing capital on Rule 325.

That was all one form.

Then we had to render an opinion on a statement of financial condition for sending to customers which was a very abbreviated statement of financial condition, that is a one-page document, sent to customers with their monthly statement.

We also were required to file as part of the answers to financial questionnaire what is referred to as a material inadequacy letter.

Then in '69, although it was not a part of the formal requirements for filing, the Securities and Exchange Commission by telephone to all of the major accounting firms requested that a copy of a computation of Rule 325 be filed with the questionnaire.

So there is four basic reports. The questionnaire, the material inadequacy letter, the Rule 325 comp and the statement of condition that is mailed to the customers.

Q Is this spelled out in the so-called engagement letter that was sent to the client at the commencement, or prior to the commencement of each year?

A Yes, it is.

Q I would like to show what we have pre-marked as Haskins & Sells Exhibits A and B marked for identification

and ask if these are the engagement letters between Haskins & Sells and Francis I. duPont for the years 1969 and 1970 (handing)?

A Yes, they are.

MR. HYDE: I offer these into evidence.

MR. CAMHY: May I ask the relevance?

MR. HYDE: Yes. I heard Mr. Camhy yesterday say that he was charging Haskins & Sells with malpractice. I think in any malpractice case it is important to know what the professional was retained to do.

MR. CAMHY: Your Honor, only if he is being sued by the client. This action is by either a member of the public or more likely by another client. But limitations of his engagement are not necessarily controlling, and perhaps not even relevant to what the public expects from the certificate that he puts on balance sheets.

THE COURT: Well, it may or may not be. It certainly seems to me it illuminates what his role is and what he is supposed to do.

They are received.

(Defendant Haskins & Sells Exhibits A and B were received in evidence.)

xx MR. HYDE: Your Honor, in view of Mr. Camhy's objection I would like to take something out of order.

I had not had this pre-marked. I apologize. This would be Haskins & Sells Exhibit P for identification.

(Defendant Haskins & Sells Exhibit P was marked for identification.)

xx BY MR. HYDE:

Q Mr. Lill, I show you Haskins & Sells Exhibit P marked for identification and ask if that is a copy of the engagement letter between Hirsch & Co. and Haskins & Sells with respect to a surprise audit for the year 1970 (handing)?

A Yes, it is.

MR. HYDE: I offer Exhibit P in evidence.

MR. CAMHY: Your Honor, I just don't see what the engagement for the Hirsch audit has to do with this, although -- I think I will withdraw my objection. I have no objection.

(Defendant Haskins & Sells Exhibit P was received in evidence.)

xx BY MR. HYDE:

Q Mr. Lill, in your direct testimony you were shown a copy of the so-called material inadequacies letter with respect to Francis I. duPont in connection with the 1968 surprise audit.

I would like to ask you whether or not the

ms5 Lill-cross

material inadequacies letter for that year was filed by Haskins & Sells with the Securities and Exchange Commission?

A Yes, it was.

Q Could you tell us how that is done?

A The material inadequacies letter is filed in connection with the answers to financial questionnaire. It's filed with the New York Stock Exchange and the Securities and Exchange Commission, and during this period of time it was filed on a confidential basis.

Q Who did the filing to begin with?

A We filed on behalf of clients.

Q When you say it was done on a confidential basis, could you explain that?

A During this period of time, this was a new report requirement that came about in late 1967, so 1968 was really the first requirement. And during the earlier years of the requirement while it was under discussion with the Commission they agreed that it should be filed as a confidential document and that requirement stayed in being until very recently when they determined, or changed the rule and said it could now be filed as part, or it should be filed as apart of the public information.

Q Do you know where that requirement was set forth?

A That was made a part of the minimum audit requirements of Form X17(a)5.

Q Of the SEC?

A Yes.

Q Now turning to the 1969 reports, answer to questionnaire statement of condition, material inadequacies letter, and Rule 325 competition, with what regulatory agencies were those reports filed?

A The answers to financial questionnaire Parts 1 and 2 were filed with the Securities and Exchange Commission, all of the stock exchanges that duPont was a member of, and it was filed with the states in all of the states that duPont was blue skying with.

Q Which states were those?

A I would have to refer to my letter to recite them, but there were probably 15 or 20 states at least that they were filed with.

Q That is the answers to financial questionnaire. I believe you said Parts 1 and 2?

A Parts 1 and 2. Part 3 is only filed with the New York Stock Exchange, and the regional exchanges.

Q What is Part 3 in general terms?

A Part 3 is supplemental information for purposes of computing Rule 325 capital.

Now, the statement, the material inadequacy letter, at the time was only filed with the New York Stock Exchange and the SEC. The Rule 325 computation, well, I guess the Rule 325 computation and the material inadequacy letter were only filed with the Stock Exchange and the SEC.

The statement of condition to customers that was mailed to all of the customers of duPont which numbered in excess of 150,000, I believe, during this period of time.

Q In connection with the 1969 suprise audit of duPont --

THE COURT: Before you go on I want to be clear.

I am now interested in the 1969 -- what are these documents, 26 and 109? Will you tell me when they were filed and with whom?

MR. HYDE: Your Honor, may I handle it this way? I have the transmittal letters --

THE COURT: Well, please do.

What I would like to know is what documents that I have before me are you referring to?

MR. HYDE: Why don't we try to match those up. They are somewhat scattered in my--

THE COURT: I'm only interested in 1969. I want to know when they were filed with the SEC and when they were filed with the New York Stock Exchange.

BY MR. HYDE:

Q Mr. Lill, let me show you Plaintiffs' Exhibit 26 in evidence. Could you tell us which of the reports this is (handing)?

A This is the answer to financial questionnaire Part 1.

Q And let me show you Haskins & Sells Exhibit D and E marked for identification and let me ask you if you can tell from Exhibits D and E marked for identification when the answer to financial questionnaire was filed with the New York Stock Exchange and with the Securities and Exchange Commission (handing).

A The Exhibit 26 was filed with the New York Stock Exchange on November 26, 1969.

Q Could you tell us when it was filed with the Securities and Exchange Commission?

A They are filed simultaneously. It was also filed with the Securities and Exchange Commission on November 26, 1969.

MR. HYDE: Your Honor, I do not believe that Parts 2 and 3 of the questionnaire were offered in evidence by the plaintiff, and we do not propose to do so unless Mr. Camhy sees some relevance as to those.

MR. CAMHY: I don't, your Honor, but I would

like to make an objection in so far as the testimony with respect to filing. These records indicate that these things were transmitted. The word "filing" has a special meaning in this field, and it means, often means that it becomes a part of a file which is available to the public, or it is filed in some classical sense.

Now, I sugggest, your Honor, that the letters indicate that they were transmitted, not necessarily that they were "filed".

THE COURT: I think Mr. Lill has explained that the rules were that they were kept confidential and so more recently his testimony is that quite recently the SEC has made them part of the public record.

MR. HYDE: I think your Honor misunderstood. The testimony related only to the material inadequacies letter which we have not yet come to.

THE COURT: All right.

BY MR. HYDE:

Q Let me ask you specifically:

Mr. Lill, with respect to the financial questionnaire, Plaintiffs' Exhibit 26, I believe, was that a confidential document?

A No. Part 1 is filed as a part of the public record.

THE COURT: I see.

MR. HYDE: May I offer Exhibits -- I think it is Exhibits D and E marked for identification, your Honor.

THE COURT: Mr. Camhy, do you have objection?

MR. CAMHY: No objection, your Honor.

THE COURT: All right. They are received.

(Defendant Haskins & Sells Exhibits D and E were received in evidence.)

xx BY MR. HYDE:

Q Next, Mr. Lill, I would like to ask you about the date of filing of the Rule 325 computation of net capital with the Securities and Exchange Commission.

I show you Exhibit G marked for identification and ask if you can tell us from that when the Rule 325 computation was filed with the SEC (handing)?

MR. HYDE: I believe, your Honor, that that is Plaintiffs' Exhibit --

THE COURT: 109.

MR. HYDE: 109. That is correct.

THE COURT: Yes.

A That was --

MR. CAMHY: Your Honor, this indicates that it was transmitted to Francis I. duPont for filing. It does not indicate that it was transmitted to the Securities and

Exchange Commission.

MR. HYDE: The exhibit that I have offered does that, I believe, your Honor.

MR. CAMHY: Excuse me. I'm looking at Exhibit F.

THE COURT: Well, I am looking at Exhibit G.

MR. CAMHY: Okay.

A The Rule 325 computation was transmitted on December 18, 1969.

Q Was that Rule 325 computation specifically requested of you by the SEC, Mr. Lill, in the year 1969? In that connection let me show you Haskins & Sells Exhibit H marked for identification (handing).

A The Rule 325 computation was not a part of the formal requirements, but the SEC called us and the other accounting firms that were involved with the Wall Street practice and requested that hereafter you file a Rule 325 computation. So in 1969 we really filed it in compliance with that telephone call.

Q You also received a form from the SEC requesting that it be filed as well?

A Yes.

Q And that is Exhibit --

A Exhibit H.

Q (Continuing) Exhibit H?

A Yes, sir.

MR. HYDE: Your Honor, I offer in evidence Defendant Haskins & Sells Exhibits E and H marked for identification.

MR. CAMHY: Your Honor, in connection with Exhibit G --

THE CLERK: Exhibit E has already been received, Mr. Hyde.

MR. CAMHY: G and H is what --

MR. HYDE: I am sorry. I misspoke myself, your Honor. I meant Exhibits G and H.

MR. CAMHY: Your Honor, in connection with Exhibits G and H I call to the Court's attention that it appears to be based on a telephone request, and at least so far as these two documents are concerned it does not appear to be part of a formal filing.

THE COURT: But, Mr. Camhy, that is precisely what Mr. Lill just said. He said that he sent these documents, as I understand him, as a result of a request from the SEC.

MR. CAMHY: Yes, but he also said we filed them after that request, and I think the letters show that he sent them on when he received the request. Whether they became a filed document available to the public is some-

thing that I don't think these two letters show.

THE COURT: Well, all I can say is in connection with Exhibit H, I guess it is, the SEC, it reads in connection with such filing please submit. It really doesn't make any difference. But, let's proceed, Mr. Hyde. They are received.

(Defendant Haskins & Sells Exhibits G and H were received in evidence.)

xx BY MR. HYDE:

Q With respect to the so-called material inadequacies letter, Mr. Lill, let me go back for a minute to 1968.

I believe that the 1968 letter is Plaintiffs' Exhibit 218 in evidence. Let me show you Haskins & Sells Exhibit C marked for identification and ask if you can tell from that when the 1968 material inadequacies letter was filed with the Securities and Exchange Commission (handing)?

A That was transmitted to the Securities and Exchange Commission on October 2nd, 1968.

MR. HYDE: I offer that exhibit in evidence.

THE COURT: All right.

(Defendant Haskins & Sells Exhibit C was

xx received in evidence.)

Q With respect to the 1969 material inadequacies